ESTABLISHMENT OF MILITARY JUSTICE—PROPOSED AMENDMENT OF THE ARTICLES OF WAR.

FRIDAY, OCTOBER 24, 1919.

UNITED STATES SENATE,
SUBCOMMITTEE ON MILITARY AFFAIRS,
Washington, D. C.

The committee met, pursuant to the call of the chairman, in the room of the Committee on Appropriations at 10.30 o'clock a. m., Senator Francis E. Warren presiding.

Present: Senators Warren (chairman) and Lenroot.

Senator WARREN. We have with us this morning Gen. Crowder; and we are ready to hear you now, General.

STATEMENT OF MAJ. GEN. ENOCH H. CROWDER, JUDGE ADVOCATE GENERAL, UNITED STATES ARMY.

Senator WARREN. Gen. Crowder, this is a subcommittee of the Committee on Military Affairs of the Senate, having under consideration the so-called Chamberlain bill, which Senator Chamberlain says was originally the Ansell bill, and the report of the Kernan-O'Ryan-Ogden Board on that bill, and also what report has been made, so far as we have gone in considering the subject, by the American Bar Association; and, in fact, as I understand it, and I think my colleagues understand it the same way, we are to report to the full committee our suggestions or judgment, first, as to whether the present Articles of War are all that they should be and, second, how shall we change them, if at all, and if we change them, whether we shall take in whole or in part these other bills that have been proposed; and, of course, we want to hear from you along the lines of the present law and how it should be changed, if at all, and other things which you may wish to bring before the committee.

Gen. CROWDER. The problem with me is to discover just what will be responsive to the condition of the minds of the members of this subcommittee; if possible to find some way of testifying within the field of what is relevant to the inquiry which remains in your minds.

This court-martial controversy—and I believe it has been called such in your proceedings—had its beginning within the War Department with the filing of the November, 1917, briefs, which were addressed to the question of appellate power in the Judge Advocate General to reverse, modify, or affirm the sentences of courts-martial. It had its beginnings as a public controversy with the speech delivered by Senator Chamberlain on December 30, 1918, withheld by him for revision, and published in its revised form in the Congressional Record of January 3, followed closely by an interview given out by the president of the American Bar Association, Mr. Page, on January

4, 1919, announcing what he called the archaic character of the then existing military code, pronouncing it a code unworthy of the name of law or justice, and stating his intention to investigate the facts connected with its administration through a committee of the American Bar Association appointed by himself.

From that time the matter has been before the public, and there has been a torrential flow of criticism, accusation, and defamation impugning the motives of men who have helped to administer military justice during the period of this World War, until the real issues of the controversy are to-day somewhat obscured.

It will be my effort to keep without that field of accusation and defamation, and within the field of what is relevant; but these personal accusations, personal defamation, and this impugning of the motives of men who have helped administer military justice, are so interwoven and blended with the issues of that controversy that I may not be altogether successful in addressing you always on the matters that are vital to a proper revision of the code; for, of course, no one thinks we have come out of this unprecedented World War without knowing that there are many respects in which the existing code may be improved. I recognize the necessity for revision, and I hope to be able to place before the committee, as I progress in my remarks, much needed amendments to the existing code.

Now, because there are so many issues of fact in this controversy which are rapidly developing into questions of personal veracity, I would like to ask, Mr. Chairman, if it is consistent with the rules of your committee, that I be sworn.

Senator WARREN. I see no reason why the witness should not be sworn.

Senator LENROOT. If the witness desires it. It is not the custom; it is to be taken for granted, but if the witness desires it, I see no objection.

(The witness was here sworn by Senator Warren.)

Gen. CROWDER. I also want to place in the record at this point an expression of regret that I am not able to proceed now and at all times in the presence of Senator Chamberlain and subject to his cross-examination. I hope that in the discussion of these more vital issues he may be present and interrogate me, particularly on questions of fact.

Senator WARREN. We shall try to have him with us later in the hearings.

Gen. CROWDER. Now, if left to follow my own method in presenting this whole subject, I think I could classify all legitimate criticism of the Articles of War and the administration of military justice that I have heard or read under two heads—first, excessive sentences; second, illegal convictions. I propose to address myself first to the question of excessive sentences and to reserve what I have to say about illegal convictions until we come to discuss this question of appellate power, which I think is relied upon by all of you as the proper method of correcting the evil of illegal convictions.

I do not know how you can understand, or how anybody can understand, whether a sentence is excessive or not, or the degree to which it is excessive, until you know something of our military penology; that is, of the disciplinary barracks régime, at which bar-

racks are executed all of the sentences of general courts-martial for major offenses against the discipline of the Army. Therefore, I shall talk first about the disciplinary barracks.

Senator WARREN. May I ask you a question right there?

Gen. CROWDER. Yes, sir.

Senator WARREN. You speak of disciplinary barracks. In this country there has been a good deal said about the jails over in France and our men being confined in jails. Do you understand that they are jails as separated from disciplinary barracks, or are those so-called jails branches, in reality, or practically, of our system of disciplinary barracks in this country?

Gen. CROWDER. I understand they are improvised places having no connection with disciplinary barracks. There is authority given by act of Congress to designate branches of the main disciplinary barracks at Leavenworth, a discretion which has been exercised to establish branches in two places—Alcatraz and Castle William, respectively, at San Francisco and at Governors Island, New York; but I do not know that it has been exercised abroad.

Senator WARREN. Do you understand that the conduct of those jails, which has been complained of, was along the line of disciplinary barracks?

Gen. CROWDER. No, I do not; I am not prepared to speak of those places established as I suppose by the commanding general of the expeditionary forces in France.

Senator WARREN. The reason I ask is because we have had it testified that men were kept there to be returned to their duties when their conduct was such that they should be relieved.

Gen. CROWDER. It is to be supposed that they were organized along the same lines; but I can not speak of that. Gen. Bethel, who has been before you, probably could tell you about that, but I have no knowledge of the subject, and I have no means of informing myself as to what régime was adopted for the conduct of those improvised places in the theater of war.

When I finish what I have to say on the subject of disciplinary barracks and of the régime that prevails there, the treatment of military offenders confined there, this committee will know whether or not there are sentences of 40 years, 25 years, 20 years, 15 years, 10, or even 5, that are to be served as penal servitude—that is, to be satisfied only by actual imprisonment at hard labor for 40, 25, 20, 15, 10, or even 5 years; and I hope that I shall be able to place the matter upon the basis of conceded or demonstrated fact, and that no longer will the public imagination be inflamed with the view that we are exacting penal servitude for fixed periods in cases of our military offenders.

Finishing with this subject of our disciplinary barracks system and the penology in force there, I shall next take up for discussion the applicability or nonapplicability of the Bill of Rights to accused military persons. Much has been said to this committee and much has been printed in the public press on that subject. It has been represented that military accused are denied protection that civil accused get before our civil courts, and the public has been asked to deduce from this fact a kind of military tyranny characterizing the administration of military justice.

When I finish with the Bill of Rights, I shall take up the subject of courts-martial as executive agencies, and I hope, when I have finished my discussion of that subject, this committee will know whether or not there is any merit in the statement that military tribunals are dictated to by military commanders.

I shall then pass to the consideration of the question of jurisdictional and prejudicial error before courts-martial; and when I have finished with that subject I want to test out by further discussion the accuracy of certain statements that have been made to this committee on the subject of the English and French systems of military justice, and particularly the use of high prerogative writs as a means of correcting judgments of courts-martial.

I shall pass from that to a discussion of the November briefs of 1917, and then take up the pending bill. My discussion of the pending bill will assume the commission of an offense—the offense of disobedience of orders—and pass under review the successive steps of a trial under the code you are now considering, called the Chamberlain bill.

I think, when I have finished with my discussion along these lines there will be one and only one large question left upon which there will be any difference of opinion and that will be where this appellate power, which we all concede must be created, shall be located.

Now, gentlemen, as I have outlined my method of presentation of the general subject, I would like to ask whether, if I pursue that method, it will be responsive to the condition of mind of the committee?

Senator LENROOT. I think it is exactly what we would like.

Senator WARREN. I think just what you have stated, all of it, and especially the last part of it, is what we need most information on.

Senator LENROOT. I would be glad to have you, General, go through the whole course which you have just outlined.

Gen. CROWDER. It may take more than a day.

Senator LENROOT. I understand; but I think it is very important.

Senator WARREN. I think Senator Lenroot will agree with me that we shall give you all the time you want, and we may have to extend your hearing over more than one day, because we are called upon the floor of the Senate at various times.

Gen. CROWDER. Yes. First, as to excessive sentences. Frankness requires that it be conceded that there have been many—too many—excessive sentences. Five, 10, 15, 20, 25, and even 40-year sentences have been given for the principal offenses of desertion, absence without leave, sleeping on post, assaulting a superior officer, assaulting a noncommissioned officer, disobeying a noncommissioned officer, disobedience of standing orders; disobedience of an officer; but in judging the system we must take into consideration that the average sentences imposed by general courts-martial for the year October, 1917, to September, 1918, were: For desertion, a capital offense, 7.58 years; for absence without leave, 1.59 years; for assaulting a superior officer, 4.1 years; for assaulting a noncommissioned officer, 2.36 years; for disobedience of a noncommissioned officer, 3.04 years; for disobedience of an officer, 4.34 years; for disobedience of standing orders, 1.96 years. We get, therefore, a very erroneous impression from citing the relatively few cases of excessive sentences of longer duration than the average. In other

words, the question is, shall courts-martial be judged by the exceptional cases, or by the average record they have made? The answer is, of course, by both; but the explanation for the exceptional case lies in the facts of that case, which it has been very difficult to get before the committee, and which involves——

Senator LENROOT. You asked whether they should be judged by the average record, or the exceptional record, and then you said by both; because you certainly would not intimate that we should judge by the average record alone.

Gen. CROWDER. No.

Senator WARREN. You speak of that length of sentence. Does that mean the actual service? Of course they have not served their length of time; but take those that have served their time and those who are still under confinement. Does this represent the findings of the court without deducting suspensions?

Gen. CROWDER. Without deducting for any clemency at all.

Senator LENROOT. That is, the average original sentence?

Gen. CROWDER. Yes; the sentence as approved.

Senator WARREN. That is it; you have stated it better than I.

Gen. CROWDER. The public has been misled in another important regard. These excessive sentences have been commented upon as if they were absolute fixed sentences, to be served by 5, 10, 15, 20, 25, and even 40 years of actual imprisonment at hard labor. I have seen them referred to in the Congressional Record and in the public press as prison and penitentiary sentences. No adequate mention has been made of Disciplinary Barracks at which they are to be served, or of the indeterminate character of these sentences, of the system of parole in force at our disciplinary barracks, and only minor mention has been made of the system of restoration to duty with which good conduct at the disciplinary barracks while undergoing sentence is rewarded. So that these essential characteristics do not at all enter into the popular conception of our military penology. I want the committee to understand, and the country to understand, that practically all offenders against the discipline of the Army have received, in fact, indeterminate sentences to be executed not in penitentiaries or prisons but in the disciplinary barracks; and I want the committee, and through the committee the country, to understand our system of military penology in force at these barracks, including the parole system in force there. I shall first take up the subject of disciplinary barracks.

Senator Chamberlain remarks, on page 248 of the hearings, that—

> The only real reform in the articles of 1916 was that which admitted the creation of the disciplinary barracks where young men who had been convicted by courts-martial might be restored to the colors.

And, in the subsequent colloquy between him and Gen. Ansell it is made to appear that that "real reform" grew out of an opinion rendered by Gen. Ansell in the construction of the military prison statute of 1873. In truth, the whole plan of prison reform and restoration had been formulated before Gen. Ansell had reported for duty at Washington. I propose to give an accurate history of the development of that reform, because unless it is understood and Congress and the people are made aware of the military penology practiced at these barracks no judgment can be formed as to the severity of

the sentences which have been imposed by our courts-martial to be served in these barracks.

Let me say, preliminarily, that I am prompted to present this in some detail by the request of a Senator who visited my office and who was so much in ignorance of what our system of military penology was, that, upon hearing the explanation of it, he asked that this matter be placed before the public in some way so as to lift the cloud of general misunderstanding that rests over the whole subject.

I became Judge Advocate General on February 15, 1911. A controversy had been going on for years as to the treatment of military prisoners, particularly deserters. Annual reports, service journals, and the public press were filled with discussions of the general subject. One class of Army officers, perhaps the majority, believed in punishment for deterrent effect; another class favored reformatory methods. Because of the relations of this subject to the administration of military justice, I asked for orders to proceed to Fort Leavenworth, the main branch of our military prisons, and make an investigation. This investigation took place in October of 1911, and the report is dated November 17, 1911.

I first gave attention to the statute law, the act of 1873, establishing the prison and prescribing its government. I found that the organic act followed closely the legislation of the States of the Union for the establishment and maintenance of penitentiaries. Indeed, in some respects the law establishing the prison was less humane than later legislation of the United States establishing penitentiaries at Leavenworth, McNeil Island, and Atlanta; and the same illiberal rigid character must be ascribed to regulations adopted from time to time by the War Department in aid of the execution of this military prison statute. In these regulations the War Department had uniformly interpreted the law as requiring the prison to be administered as a penal institution. The prisoners were required to be clad in the usual prison-striped clothing, to wear their hair close-cropped, their faces clean-shaven, to be designated by numbers, and to be employed at the kind of daily hard labor at which convicts confined in civil prisons and penitentiaries are customarily employed.

I found 940 ex-soldiers in confinement at the Leavenworth branch. I asked to have them paraded, and, when I passed down the line, I was struck with their youthful appearance. I ascertained that the average age of these 940 men at the time of their commitment was about 23 years. Classified in accordance with the nature of the offense for which committed, I found 667, or about 71 per cent, had been committed for purely military offenses—that is, offenses against the discipline of the Army—195 for military offenses in connection with common-law and statutory offenses—most of the latter were misdemeanors—and 78 were common-law and statutory offenses.

When I finished this inspection of the military prison, I went over to the United States penitentiary, located on the same reservation, and took a look at the inmates of that institution. They were men of more advanced years—most of them veteran criminals—all felons—and yet subjected to no more severe prison régime than were our young ex-soldiers at the military prison. I reached the conclusion that our system was fundamentally wrong. On returning to Washington at the conclusion of this investigation, I submitted my report, which I am going to ask the committee to publish as an appendix to my statement. Have I permission to do that?

Senator WARREN. Is it very voluminous?

Gen. CROWDER. No.

Senator WARREN. It could go in at this place in the report, and not as an appendix?

Gen. CROWDER. I would like to have it go into the record at this point.

Senator WARREN. Yes.

(The report referred to is here printed in full in the record as follows:)

MEMORANDUM FROM THE JUDGE ADVOCATE GENERAL TO THE CHIEF OF STAFF, NOVEMBER 17, 1911.

CHANGE OF ADMINISTRATION OF THE MILITARY PRISON FROM A PENAL INSTITUTION TO A MILITARY REFORMATORY.

It does not admit of question, I think, that the laws applicable to the military prison require it to be administered as a penal institution. As pointed out in my former report, they follow closely the legislation of the States and the later legislation of the United States for the establishment and maintenance of penitentiaries. This is especially evident when the provisions embodying the requirements for employment of inmates at daily hard labor and in the trades are considered. In some respects the laws applicable to the prison are less humane than later legislation of the United States creating penitentiaries. For example, the provisions of the act of March 3, 1890 (26 Stat., 839), that in the construction of prison buildings there shall be such an arrangement of cells and yard space that prisoners under 20 years of age shall not in any way be associated with prisoners above that age, and that the management of the class under 20 years of age shall be, as far as possible, reformatory, is not found in the laws relating to the military prison.

The regulations adopted from time to time for the government of the military prison and its inmates (editions of 1877, 1883, 1888, 1890, and 1910) show that the War Department has uniformly interpreted the law as requiring the prison to be administered as a penal institution. In the five editions of said prison regulations it has been provided that prisoners should be clad in prison dress, wear their hair close cropped, with face clean shaven, be designated by numbers, and employed at the kind of hard labor at which convicts confined in civil prisons and penitentiaries are customarily employed. While in the several editions of prison regulations in force down to 1895 the inmates of the prison were uniformly designated as "prisoners," in the present edition of the regulations the term "convict" is uniformly used.

The department has uniformly administered the prison as a penal institution. This is made to appear from the present employment of prisoners confined therein, which does not differ from past employment, except in so far as their labor is diverted to the work of new prison construction, and which the commandant states as follows:

"1. *Domestic labor.*—This includes orderlies, messengers, clerks, barbers, cooks, bakers, waiters, hospital attendants; and tailors, shoemakers, harness makers, blacksmiths, electricians, tinners, carpenters, wheelwrights, carpet weavers, steam fitters, etc., for repair purposes only; laundrymen, librarians, warehouse laborers, teamsters, butchers, printers; total, 250.

"2. *Construction work* on new prison and the shops and industries in connection therewith; total, 450.

"3. *Outside work* in connection with the construction of roads, the operation of the terminal railway, the care and preservation of the forest, the care of the reservation, and prison farm; total, 240. (This number is far below the daily requirements and does not meet the demands.)"

Under the theory that the prison will continue to be administered as a penal institution after the completion of prison construction, the commandant recommends that they be employed as follows:

"1. *Domestic labor.*—This includes orderlies, messengers, clerks, barbers, cooks, bakers, waiters, hospital attendants; and tailors, shoemakers, harness makers, blacksmiths, electricians, tinners, carpenters, wheelwrights, carpet weavers, steam fitters, etc., for repair purposes only; laundrymen, librarians, warehouse laborers, teamsters, butchers, printers; total, 250.

"2. *Operation of shops inside the prison.*—In the operation of the shops such work would be recommended as would be least liable to cause interference from outside labor, as follows: Making shoes for the use of all prisoners in the Army; making harness for the use of the Army; making brooms for the use of the Army (a large part of the broom corn can be raised on the prison farm); making tinware and stove pans, etc.,

for the use of the Army; also galvanized-iron buckets; making clothing for all prisoners in the Army, especially civilian suits for discharged prisoners; repair of wheel transportation; laundry work; total, 250. This number depends, of course, upon the amount of work of this class that is given the prison to do and can be expanded indefinitely.

"3. *Outside work.*—(*a*) The operation of the prison farm: Between 700 and 800 acres of land are now available for farm purposes; this will have to be diked and the diking will have to be of the very best; the river bottoms will have to be protected; it appears to be possible to do this and have an 800-acre farm in the bottoms; 200 additional acres could be secured on the reservation on the northwest side without interference with any military operations; a 1,000-acre farm, using a large part of it as a truck garden, would give employment to a large number of convicts. (*b*) The operation of a dairy for the use of the prison. (*c*) The repair and maintenance of post roads and the construction of reservation roads; approximately 12 miles of rock road are to be built. (*d*) Grading; the number of hills to be removed and the amount of yardage is very great. (*e*) Drainage and construction of culverts and bridges; this work requires a large amount of labor. (*f*) Care of the forest and the conversion of waste portions of the forest into park land for use of troops in maneuvers. (*g*) Crematory and disposal of wastes; should the crematory be removed from its present location, which appears to be inevitable, the construction and maintenance of it should be turned over to the prison. (*h*) Operation and repair of the terminal railway system; the handling of all freight, coal, and forage in connection with the operation of the railway system. (*i*) Operation of the rock quarries, crushers, limekiln, brick plant, concrete-block machines in connection with such work at the prison and post as may be authorized by the Quartermaster General. (*j*) Installation of a water supply for the prison and post. (*k*) Operation of an electric-light and power plant for the prison and post. (*l*) Operation of an ice and refrigerating plant for the prison and the post."

Because of the proximity of the military prison to the large and important post of Fort Leavenworth, and the extensive and urgent demands for labor upon the post reservation indicated above, it is probably true that no similar institution of the United States or of any State or Territory is in such a favorable situation for the utilization for public purposes of free prison labor. The extensive employment of its inmates at daily hard labor on the much needed and urgent improvements of the military reservation proper, the conservation of the forests, and the building of roads, for which contract labor would otherwise be necessarily employed, would result in very obvious economies to the Government; while the employment of the prisoners on the large prison farm (about 900 acres) in the raising of food products, in the shops of the prison at trades in the manufacture of articles for use of prison and prisoners confined there and at posts, would be a long step in the direction of making the prison self-sustaining. The argument of economy is thus seen to be exceptionally strong, and, in connection with the opportunity the work outlined above affords for the training of prisoners in civil employment and graduating them back into civil pursuits under conditions which would put them in the way of establishing themselves in civil life upon their release from the military prison, constitutes the most persuasive argument that can be urged, I think, in favor of continuing the administration of the military prison as a penal institution.

I am prepared to concede to this argument controlling effect as to the inmates of the prison convicted of common-law and statutory felonies alone. These belong to the regular criminal class, and their punishment should conform to what is prescribed by law for this class of prisoners undergoing punishment in our United States, State, and Territorial prisons; but I do not think it should be regarded as decisive of the more important question presented, viz: Should soldiers, convicted of purely military offenses, committed in time of peace, be subject to ignominious penal servitude similar to that inflicted upon common-law and statutory felons? Preliminary to a discussion of this question, I invite attention to the following classification of prisoners serving sentence at the military prison, Fort Leavenworth, at the time of my inspection:

TABLE NO. 1.—*Prisoners convicted of military crimes only.*[1]

Of desertion only	440
Of desertion and fraudulent enlistment only	104
Of desertion and other military crimes other than fraudulent enlistment	56
Of desertion, fraudulent enlistment, and other military crimes	12
Of military offenses, not including desertion and fraudulent enlistment	6
Of fraudulent enlistment only	49
Total	667

[1] Slight variances in totals appear in these tables which do not affect the argument based upon them.

TABLE NO. 2.—*Prisoners convicted of military crimes in connection with common-law and statutory crimes.*

Of desertion and common-law and statutory crimes, not military	75
Of desertion, fraudulent enlistment, and common-law and statutory crimes not military	10
Of desertion, fraudulent enlistment, other military crimes, and common-law and statutory crimes not military	12
Of desertion and other military crimes, not including fraudulent enlistment, and common-law and statutory crimes	48
Of military crimes, not including desertion and fraudulent enlistment, and common-law and statutory crimes	46
Of fraudulent enlistment, other military crimes not including fraudulent enlistment, and common-law and statutory crimes	4
Total	195

TABLE NO. 3.

Number of prisoners convicted of common-law and statutory crimes only	78

Summary.

Prisoners convicted of military crimes only	667
Prisoners convicted of military crimes in connection with common-law and statutory crimes	195
Prisoners convicted of common-law and statutory crimes only	78
Grand total	940

TABLE NO. 4.—*Desertions.*

	Number.	Average age of enlistment.
First year of enlistment	431	23 years 5 months 28 days.
Second year of enlistment	210	23 years 2 months.
Third year enlistment	34	22 years 8 months 16 days.
Second enlistment period	59	26 years 1 month 25 days.
Third enlistment period	12	29 years 10 months 4 days.
Fourth enlistment period	5	32 years 7 months 9 days.
Fifth enlistment period	2	39 years 11 months.

The data for the Pacific branch of the United States military prison at Alcatraz Island, Calif., if assembled, would probably show similar percentage strength of the several classes of prisoners confined in said branch.

The foregoing classification is not as complete as it is desirable that it should be, in that it fails to distinguish between civil felonies and misdemeanors. It is doubtless true that a large majority of the prisoners listed as common-law and statutory offenders have been convicted of misdemeanors only, and that therefore only a very small percentage of the inmates of the military prison belong to the regular criminal class.

It will be noted that the average age at enlistment of prisoners serving sentences for desertion is about 23 years. I did not ascertain the average age at enlistment of other classes of offenders, but it is presumably about the same as for deserters. The average age of prisoners at the time of my inspection may be safely estimated at between 25 and 26 years. The contrast in respect of age between them and convicts of the United States penitentiary located on the same military reservation, which I visited, is most marked, the latter being in appearance a much older class of men. In prison dress and in the methods of treatment and daily employment of inmates there is no substantial difference between the two institutions, and the inmates of the prison are undergoing penal servitude of the same character as inmates of the penitentiary, with the additional ignominy in case of deserters of loss of citizenship rights, of rights to become citizens, and the right to hold office of trust or profit under the United States.

Recurring now to Tables 1, 2, and 3, we find that of the 940 prisoners undergoing sentence at the military prison at the time of my inspection, 667—approximately

71 per cent—were convicted of purely military offenses. If we add to these those convicted of purely military offenses in connection with common-law and statutory offenses of the grade of misdemeanor, ordinarily punished by light jail sentences, we shall have a total of approximately 90 per cent of the inmates of the prison, by far the greater number deserters, who may be said not to belong to the regular criminal class, but who are undergoing the same kind of penal servitude as felons confined in the United States penitentiary located on the same reservation. The question whether penal servitude is a proper punishment for them is thus seen to turn mainly on what is a proper punishment for desertion in time of peace.

Perhaps there is no other single subject connected with the administration of the Military Establishment which has received more earnest attention by the military authorities than this subject of desertion, its causes, and its proper punishment. Annual reports, service journals, and the public press have teemed with its discussion. It may be said also that there is no other single subject connected with Army administration in respect of which such diverse views have been expressed. Systematic efforts have been made to ameliorate the condition of the soldier in respect of his living, dress, enjoyments, comfort, and contentment as a means of reducing desertion rates. The Inspector General, in his report of 1905, summarizes the efforts of the Government in this regard as follows:

"It has constructed for him barracks luxurious in their appointments compared to the housing of the armies of other civilized countries throughout the world; it has provided in these barracks air space in dimension equal to the demands dictated by the best scientific thought; it has given him spring beds, mattresses, pillows, sheets, and pillow cases; it has provided him with toilets and baths of the most modern manufacture, and much superior in general appearance and effect to similar necessities enjoyed by people in middle life; it has provided spacious reading rooms, supplied with newspapers and books calculated to cater to the soldier's taste; it has bettered the amount and quality of his clothing; it is to-day supplying him with the largest variety and best quality of food that is given to any Army, and at many of the large posts it has provided magnificent exchange buildings, not a few of which have swimming tanks and gymnasiums thoroughly equipped for athletic exercises. It has made the demands of discipline and authority over the soldier, in conformity with the spirit of the age, mild compared to what it was 20 years ago; it sends the uneducated soldier to school and gives the partially educated every advantage of an extended education; it has provided outdoor amusements for him in the way of athletic games; and it has, in fact, accomplished everything to make him contented and to cause him to live out his enlistment, with one exception—it has failed to provide an adequate punishment for the crime of desertion.

"Nine-tenths of the soldiers who desert from the Army of the United States have no real cause for the act."

But the efforts of the Government have not been limited to what is outlined in the foregoing report of the Inspector General. We have tried the additional expedients of long-term and short-term enlistments, bounty for reenlistment, retained pay and detained pay, forfeited to the Government by desertion, discharge by purchase and, finally, increased pay—all, except discharge by purchase, without appreciable deterrent effect upon the commission of the offense of desertion. If, as claimed by the Inspector General, we have failed to find adequate punishment for desertion, it is not because we have not run the gamut in this regard; for we tried the ignominious punishment of branding and tattooing the deserter, the wearing of ball and chain, and long sentences of penal servitude. We have also tried the expedient of recognizing different grades of criminality in desertion, distinguishing between the recruit led off by companions, homesickness, ignorance, and the old soldier who commits the offense with full knowledge and deliberation, giving to the former a very short term of imprisonment and frequent restoration to duty, and preserving as to the latter the long sentence of penal servitude. In 1908 we abandoned the attempt to distinguish between the recruit and the old soldier in respect of this offense and provided one punishment for desertion, only to return to the prior system in 1911. That none of these expedients has been attended with results which were satisfactory to the department tends directly to support the view expressed by The Adjutant General of the Army in his report for the fiscal year of 1908, that:

"The principal cause of the evils in question lies deeper than any of the causes commonly assigned for them, and is beyond the reach of any of the measures proposed. Our people, although aggressive enough, are not a military people. They have little real interest in the Army in time of peace, and from the earliest days of the Republic have been accustomed to look upon it as a more or less unnecessary institution that may be pared down with safety whenever a demand for retrenchment of public expenses arises. Enlistment in the Army in time of peace is not uncommonly regarded

as evidence of worthlessness on the part of the recruit, and desertion in such a time is generally looked upon as nothing more culpable than the breach of a civil contract for service. The deserter suffers little or no loss of caste by reason of his offense, and is seldom without friends and sympathizers to shield him from arrest and to intercede in his behalf in the comparatively rare event of his falling into the hands of the military authorities.

"It is safe to predict that desertion from the Army will continue to be excessive until there shall have been a radical change of public sentiment toward the Army and until the deserter shall come to be regarded as the criminal that he is, to be ostracized and hunted down as relentlessly as any other transgressor of the laws. There is no reason to look for such a change of sentiment in the near future, and there are some who believe that the change will never come until our people shall have learned through national disaster and humiliation, that the effective maintenance of an Army of professional soldiers is absolutely essential to the preservation of the national honor and life, and that the trained and disciplined troops of a modern enemy can not be withstood by hastily organized armies of untrained or half-trained civilians."

I concur in the view here forcefully expressed that the main obstacle encountered by the military authorities in their efforts to reduce desertion is found in the attitude of the people toward this offense. Public opinion, with which we have to reckon in the enforcement of any law or policy, does not associate and never has associated moral turpitude with desertion in time of peace. For this reason we do not have and never have had the cooperation and aid of public sentiment in the execution of our policy of treating desertion as a felony and punishing the deserter as a felon. I concur further in the view intimated above that this state of feeling is an outgrowth of our military policy to rely upon a volunteer army rather than upon an army of professional soldiers, and that the sentiment will continue so long as that policy continues; that is, for the indefinite future. It must, I think, be taken into account in determining our policy in dealing with the offense.

But in the past three years marked success has been achieved in reducing desertion rates in face of this adverse public sentiment by the vigorous campaign for the apprehension and punishment of deserters inaugurated by The Adjutant General's Office. The system of apprehension is fully explained in the annual reports of The Adjutant General for the fiscal years 1909 and 1910. It involves telegraphic notice to The Adjutant General's Office of every desertion, the preparation and distribution of desertion circulars, containing personal descriptions and reproductions of photographs of deserters, with an announcement of rewards payable for their apprehension and delivery. It appears that about 4,000 copies of such desertion circulars are distributed to department, post, troop, battery, company, or detachment commanders, to United States marshals, police officers of the larger cities, to established detective agencies, to agents of the Secret Service Division of the Treasury Department and of the Bureau of Investigation of the Department of Justice, and to civil peace officers in the vicinity of the homes of the deserters and in localities to which they are likely to go.

The system outlined above became fully inaugurated in October of 1908. It found the desertion rate of the Army for the fiscal year ending June 30, 1908, at 4.59 per cent. Its deterrent effect was not immediately apparent, for in the fiscal year of 1909 there was a slight increase in the desertion rate. This is explained in the report of The Adjutant General for that year by the fact that the enlisted strength of the Army was largely increased during the year, with the result that an unusually large proportion of the enlisted men were serving in the earlier part of their enlistment, when desertions are most frequent. In the fiscal year of 1910, when normal conditions in this regard were more nearly approached, the desertion rate fell to 3.66. In the fiscal year of 1911 it fell to 2.28 per cent, the lowest desertion rate that has been reached since the establishment of the military prison in 1874, except for the fiscal year of 1898, when because of the very large increase in enlistments incident to the war the percentage rate decreased to 1.57.

I think service opinion will be found to support the view that this very marked reduction in desertion rates is to be attributed almost entirely to the system of apprehension and punishment of deserters outlined above and would view with marked disfavor any modification of the system which would tend to imperil the excellent results that follow its employment. The point to which I would invite special attention is the necessity, if any, for retaining the degrading punishment of ignominious penal servitude, or, stated in other words, whether the change in the character of the punishment, retaining its severity in so far as is consistent with the change, would impair the excellent results to be obtained under the system as now enforced.

That the stigma of prison confinement operates as a deterrent to desertion must be conceded, just as we must concede deterrent effect to the old but now disused pun-

ishments of branding and tattooing of deserters, but to what extent prison confinement has operated to deter desertion is not readily deducible from desertion statistics. It sufficiently appears, however, that during the entire period we enforced penal servitude as a punishment for desertion the department was confronted with the unsatisfactory results already referred to, and that results did not become measurably satisfactory until the vigorous campaign looking to the apprehension of deserters was fully inaugurated. A comparison of desertion statistics of the period from 1875 to 1895, during which the military prison was available for confinement of soldiers convicted of purely military offenses, with the period from 1896 to 1906, during which it was not so available, shows that the percentage of desertion to total enlisted strength during the former period was approximately 6.77 per cent, and during the latter period 4.68 per cent, excluding the year 1898, during which the percentage was, for abnormal causes, unusally low. There is thus seen to have been an actual falling off in the rate of desertion during the period that penal servitude was not in force, a reduction which must be attributed, however, largely to the fact that discharge by purchase was operative during the entire period from 1896 to 1906, whereas during the former period of 21 years it was operative only for 5 years. Still, the fact that the effect of discharge by purchase in reducing desertion was not in a greater degree neutralized by the abatement in the character of the punishment would seem to furnish some suggestion that the stigma of penal servitude, standing alone, has not a relatively important deterrent influence upon desertion.

The question has, however, another aspect which I think merits consideration. I find that since the restoration of the prison to military control in 1906, 3,924 prisoners have been confined therein. The number confined in the prison from its establishment in 1874 down to its transfer to the Department of Justice in 1895 I have been unable to ascertain, but it is undoubtedly very large; nor have I available the number of men who have been confined in the branch prison at Alcatraz during the period of its existence. Taking a total of these we have a very large number of persons who have passed from these prisons into civil life. In common with other soldiers dishonorably discharged and held in confinement at posts, they remain after discharge from confinement under statutory disability for future military service, those convicted of desertion having the additional disabilities of loss of citizenship rights, of rights to become a citizen, or to hold any office of profit or trust under the Government. They constitute a large and ever-increasing element of our population properly described as military outcasts.

That the organic act establishing the military prison (act of Mar. 3, 1873) contemplated that this element should to some extent be saved to the Army is made plain by the provision of section 6 of that act, that:

"The Secretary of War is authorized and directed to remit, in part, the sentences of such convicts and to give them an honorable restoration to duty in case the same is merited."

I can not ascertain that the Secretary of War has ever made any use of the authority here given him to restore prisoners to duty. It has not been possible for him to do so since the enactment of the act of August 1, 1894, prohibiting the reenlistment of men whose last preceding term of enlistment has not been honest and faithful. In order that the inmates of the prison may have restored to them the chance for honorable restoration to duty with the colors which the Congress granted them in the original enactment, it will be necessary to seek such amendment of the act of August 1, 1894, as will except from its prohibition inmates of the military prison confined therein for purely military offenses and discharged therefrom as good-conduct prisoners, with the recommendation of the prison authorities that they be allowed to reenlist. Administered upon these lines the prison would acquire the character of a reformatory, or detention barracks such as are now maintained by England for the confinement of purely military offenders, and which are described by an officer of our Army who has recently inspected them, as follows:

"Only such soldiers as have been convicted of military offenses as distinguished from statutory or common-law offenses are sent to detention barracks for punishment and correction. The controlling idea in the treatment of the soldier, where confined in the barracks, is to reform him and send him away from the institution a better instructed soldier than when he entered. He is worked 10½ hours a day. No prison garb is worn. The soldier is in uniform at all times, except possibly when in the workshops, and then he wears working clothes. They are designated by name—no numbers are used. Although the inmates are kept under close surveillance during the day, and in barred cells under lock and key at night, yet every effort consistent with this is made, and with considerable success, to eliminate the prison atmosphere and aspect of the surroundings. Hard work, wholesome food, plenty of sleep, regular hours, kindly treatment, and total abstinence from the use of all intoxicants and

tobacco soon bring the man under control of his own will. This is the condition the authorities attempt to develop as a preliminary to proper reformation of character. Much of the work is purely military and especially designed to perfect the man in marksmanship and the use of his weapons. There is daily instruction for some hours in this class of work. The barrack inclosure is fitted up with almost every known device for training in shooting, and I was told that remarkable results are secured. Instruction is also given in military bridge building and in other types of purely military work, including a very thorough course in gymnastics.

"Each man is required to do a certain amount of work daily in the workshops. All of this work has a direct bearing on the military service and includes such tasks as repairing picks, shovels, barrack chairs, mattresses, beds, etc., which are sent to the institution from the garrisons on the outside. Very few of the inmates possessed any of the ordinary characteristics of the criminal class in appearance or bearing, and as a matter of fact they do not belong to this class. Had I seen the same men doing the same work in other surroundings I would have noted no special difference between them and other soldiers. They appeared to work with spirit and willingness, and a good atmosphere pervaded the place. The treatment by those over them, while severe and unrelenting, is very kindly. * * * The director of the institution said that he seldom or never had the same man committed a second time.

"It is worthy of note that all cases of desertion are handled here.

"The controlling idea is to send the man out sound in mind and body, reformed, and as well instructed in his duties as a soldier as he would have been had he remained in his organization."

The attitude of the English people toward desertion is the same as that of our own people. There, as here, public opinion does not associate moral turpitude with this offense. The reason is not far to seek. The contract of enlistment is voluntarily entered into and the abandonment of the service is considered by the people simply a breach of the voluntary contract. In the British service the fact has been recognized and the policy of punishing deserters as felons has been abandoned. We persist in the policy in the hope, which I think can never be realized, that by so persisting we can educate our 90,000,000 people to take the service view that the deserter should be punished as a felon.

From what has been said above it is evident that if we should adopt, in principle, the system of detention barracks as administered in the British service, there need result no abatement in severity of punishment now obtaining in our service, except in so far as relieving prisoners from the ignominy of penal servitude would be an abatement. This could be compensated for to some degree by increasing the punishment for military offenses. Daily hard labor to the extent necessary for the domestic administration of the prison would continue as heretofore, but the system would require that there should be relief from daily hard labor not connected with said domestic administration and the time thus saved given over to the most rigid military instruction; and it would seem reasonable that, under such instructions, inmates would acquire proficiency in rifle practice and other specialized military training equal if not superior to that acquired by men who remain with the colors, and that such opposition as may now exist among officers and enlisted men to receiving inmates of the prison back into their organizations would in a very large measure disappear as to those good-conduct prisoners who acquire such proficiency and are discharged with the recommendation that they be permitted to reenlist.

The details of the new system would, I think, be appropriately fixed by a board convened especially for the purpose. I think it would be an essential part of the new system that prisoners undergoing confinement at the military prison or its branch for grave common-law and statutory crimes, and those convicted of such crimes in connection with military offenses, should be segregated.

I would suggest that Alcatraz Prison and Fort Jay Prison be reserved for their confinement, and their administration as prisons continued. And I would further suggest that those convicted of purely military offenses would be properly confined in the detention barracks, to be subjected to special discipline, the general outlines of which are given above, with a view to their restoration to duty with the colors. There would remain those convicted of common-law and statutory misdemeanors of a character ordinarily punished with light jail sentences, or of such misdemeanors in connection with purely military offenses. These, under the policy above outlined, should be sent, I think, to the detention barracks, there to be kept employed at daily hard labor connected with its domestic administration, to be admitted to the classes undergoing special military instruction only as their conduct may justify it. The effect would be such a division of military prisoners under sentence by court-martial as would segregate and give over to special training all those who have offended primarily against the discipline of the Army, leaving the regular criminal classes under the prison régime to which they are at present subjected.

In view of the fact that we are legislatively committed to the maximum use of the labor of military prisoners on new prison construction, the change from prison to detention barracks must await the completion of said construction—about two years—unless it can be assumed that Congress will be found willing to complete said construction by contract labor. But when the new prison is completed the way will be open to inaugurate the change, which can be administratively accomplished, except in the following regards, where it would be advisable to have amendments of the existing law so as to provide:

1. For changing the name "United States military prison" to "United States detention barracks," and for making the designation of the inmates of the detention barracks uniform by eliminating the term "convict" wherever necessary and substituting therefor the term "prisoner," which latter term is used in the existing law as synonymous with the term convict.

2. For exempting the detention barracks from the existing provision vesting the government and control of the prison in the Board of Commissioners of the United States Soldiers' Home; this for the reason that the detention barracks would become an integral part of the military establishment, to be administered directly as any other department thereof.

3. For modifying the provision of existing law respecting the employment of prisoners in said detention barracks so as to limit the daily hard labor of prisoners confined therein to what is required for purposes of domestic administration, as outlined above by the prison commandant, and directing that prisoners not so employed shall be subjected to a rigid course of military training and instruction.

4. For exempting from the prohibitions of section 1118 of the Revised Statutes against the enlistment in the military service of any deserter therefrom and of section 2 of the act of August 1, 1894 (28 Stat., 216), against the reenlistment in the military service of any soldier whose service during his last preceding term of enlistment has not been honest and faithful, all good-conduct prisoners discharged from the detention barracks or post guardhouse with the recommendation of the authorities of the detention barracks or post that they be permitted to reenlist.

5. For the modification of the requirements of sections 1996 and 1998, Revised Statutes, so as to provide that the forfeiture of citizenship rights or of the right to become citizens shall not attach to a conviction of desertion committed in times of peace.

Other minor changes will be required in the existing law, and of course, extensive amendments of the existing regulations governing the United States military prison at Fort Leavenworth would be necessary to conform them to the amended law.

The last recommendation (No. 5) was designed to remove the forfeiture of citizenship rights, or of the right to become citizens, which those statutes imposed in case of desertion committed in time of peace, leaving that penalty in force for desertion committed in time of war; and I will interpolate here that these statutes had their origin in the Civil War Act of March 3, 1865, and represented the then thought of Congress on the subject. This act was a sweeping, drastic provision which required that this penalty of forfeiture of citizenship rights and of the right to become citizens should attach automatically to a conviction of desertion and made no distinction between peace and war.

We lived under that statute up until a subsequent date, which I shall refer to in the further remarks that I have to make to the committee.

Projects of legislation to carry out both (4) and (5) were submitted to the War Department and transmitted to Congress and a project of an act repealing the prison statute and substituting therefor the disciplinary barracks statute, which ultimately became the act of March 4, 1915, was submitted by me to Congress on May 27, 1912. That project provided for both restoration and reenlistment of good-conduct prisoners.

Segregation.—At my inspection in 1911 I found purely military offenders held in close association with common-law and statutory felons. I recommended in my report the segregation of these military offenders, and on December 29, 1911, this recommendation was carried into effect by the issue of orders prepared by me directing that all felons held at Leavenworth, with the exception of a few with short periods of confinement remaining to be served, be transferred to Alcatraz; and all prisoners at Alcatraz convicted of purely military offenses, with like exception, be transferred to Leavenworth; giving to Leavenworth prison the character of a disciplinary barracks or reformatory, but continuing Alcatraz as a penal institution. The same order changed the designation of the inmates at Leavenworth from military convicts to general prisoners.

In other words, I was trying to proceed in advance of an act of Congress, and as far as I could go without the authorization of Congress, to establish this reform immediately.

Nothing further was accomplished in the way of prison reform in the year of 1911. My report was submitted in November, 1911, and segregation was an accomplished fact before December 31 of the same year.

What was done was preparatory to the inauguration of greater reforms when the necessary legislation could be secured from Congress.

I appeared before the Military Committee of the House in May of 1912 in support of the then pending revision of the Articles of War. Section 2 of that revision contained the reform of the prison statutes. The salient provisions of the bill were:

(1) Changing the designation from prison to barracks.

(2) Segregating military offenders from felons.

(3) Placing the control of the barracks directly under the control of the Secretary of War. You will remember, Senator Warren, that the military prison was then under the control of the board of governors of the Regular Army Soldiers' Home, located in the District of Columbia.

Senator WARREN. Yes; I remember that.

Gen. CROWDER. The next provision was:

(4) Authorizing prisoners confined in the barracks to be placed under military training with a view to honorable restoration to duty or reenlistment; and

(5) Authorizing the Secretary of War to restore to duty prisoners confined in said barracks.

This section 2, along with the revision of the Articles of War, failed of a favorable report by the House committee. However, on August 22, 1912 (37 Stat., 356), Congress enacted the law recommended in my report of 1911 exempting peace-time deserters from loss of citizenship rights and permitting the reenlistment of peace-time deserters and other classes of prisoners whose prior service had not been honest and faithful, when specially authorized by the Secretary of War. We immediately entered upon the policy of reenlistment of prisoners confined in the military prison.

Gen. Ansell did not report for duty in the Office of the Judge Advocate General until March 11, 1912, after all the legislation on the subject which was afterwards enacted into law had been formula-

ted. I do not think he has claimed or would claim that the scheme was in any sense his own, or that he had any substantial part in formulating the several projects.

Reenlistment.—As I have said, immediately following the enactment of August 22, 1912, we commenced the policy of recommending deserving general prisoners confined in the military prison for reenlistment, and in the annual report of the prison commandant for the fiscal year ending June 30, 1913, is found the statement that 63 general prisoners had been recommended for reenlistment under that act.

In August of 1913 I made a second inspection of the military prisons, and in my report of that inspection recommended that we proceed in advance of any authorization by Congress to inaugurate that part of the scheme of reform which looked to military training of deserving general prisoners. On September 17 of 1913 there was issued from the War Department, upon my recommendation, General Order No. 56, War Department, 1913, which I will insert here:

GENERAL ORDERS, No. 56.

WAR DEPARTMENT, *Washington, September 17, 1913.*

1. General prisoners confined at the United States Military Prison at Fort Leavenworth, Kans., under sentence for purely military offenses alone, whose record and conduct are such as to entitle them to the privilege, will be afforded an opportunity to receive a special course in military training during a portion of the time that would otherwise be devoted to hard labor. To that end, the formation of one or more, but until further orders not exceeding four, disciplinary companies at said prison is hereby authorized and directed.

2. Except in particular cases in which the commandant of the prison deems such enrollment unwise, all general prisoners of the first class (paragraph 30, Regulations, United States Military Prison, 1909), confined at the United States Military Prison at Fort Leavenworth, Kans., under sentences for purely military offenses alone, will be enrolled in disciplinary companies, but no such general prisoner shall in any case be excluded from enrollment in a disciplinary company, or from regular participation in the course in military instruction, because his services may be regarded as desirable or necessary elsewhere.

3. Disciplinary companies will be organized as Infantry, and four such companies will constitute a disciplinary battalion.

DETAILS OF ORGANIZATION.

Disciplinary Company—

Officers.—One captain or first lieutenant detailed as company commander, and 1 lieutenant detailed for duty with the company.

Enlisted men.—One sergeant detailed as acting first sergeant, 1 sergeant detailed as acting quartermaster sergeant, 4 sergeants, and 8 corporals.

General prisoners.—Two under instruction as musicians and 56 under instruction as privates.

The number of general prisoners placed under instruction as privates in a disciplinary company may be increased to 84, in which case the number of enlisted men assigned to duty with the company will be increased by 2 corporals and 2 lance corporals.

Disciplinary Battalion—

One major or captain detailed as battalion commander.

One first lieutenant detailed as battalion adjutant.

One sergeant detailed as acting battalion sergeant major.

Four disciplinary companies.

4. The officers required for duty with disciplinary organizations will be detailed in orders from the War Department, and the enlisted men required for duty as noncommissioned officers of such organizations will be assigned thereto by the commandant of the prison from enlisted men assigned to duty at the prison for that purpose.

5. General prisoners enrolled in disciplinary organizations will be placed under military training and instruction during one half of each working day, but will be required to work during the other half. Exceptions to this requirement may be made by the commandant in cases of individual skilled workmen and paroled prisoners

absolutely necessary in the work of reconstruction and in the operation of the railway and in other like employment, but this discretion will not be exercised in such a way as to deprive these men of a fair amount of military training and instruction.

6. When under instruction as members of a disciplinary organization, and during periods of leisure, general prisoners will be dressed in such uniform, without facings or ornaments, as may be prescribed by the Secretary of War. For this purpose obsolete service uniforms will be utilized. When at work, general prisoners enrolled in disciplinary organizations will be dressed in fatigue clothing.

7. Disciplinary organizations will be armed and equipped as Infantry, with such exceptions as to equipment as may be recommended by the commandant of the prison and approved by superior authority. The firing pins of rifles placed in the hands of general prisoners enrolled in disciplinary organizations will be removed, but may be replaced temporarily while the prisoner is engaged in gallery practice under official supervision within the prison inclosure.

8. General prisoners enrolled in disciplinary companies will be designated by name and not by number; will not be required to work in the same party with general prisoners not enrolled in disciplinary companies; will be quartered in a separate section of the prison; will be seated at separate tables in the dining room and in a separate section in the chapel; will be permitted the privilege of rendering the prescribed military salute; and when under arms, at work or at meals, will be permitted to converse with each other under the restrictions that govern enlisted men while similarly engaged.

9. The course of military training and instruction for general prisoners enrolled in disciplinary organizations will include: physical training; personal hygiene, including care of the uniform; the school of the soldier, squad, company, and battalion; dismounted Cavalry and Field Artillery drill; elementary signaling; care of arms and equipment; aiming and sighting drill; gallery practice, rifle and revolver; saber drill; estimating distances; pitching and striking tents; hasty shelter—use of intrenching tools; knots and lashings; duties of enlisted men in military bridge construction; and lectures on the duties of enlisted men in the service of security and information—outposts, advance, rear and flank guards, and scouting.

10. Under the foregoing regulations one disciplinary company will be organized at Castle William, Fort Jay, N. Y.

11. General prisoners confined at Castle William, Fort Jay, N. Y., under sentence for statutory or common-law crimes or misdemeanors alone or in connection with purely military offenses, are not eligible for membership in the disciplinary company to be organized at that place. They will be kept separate from purely military offenders so far as prison facilities permit, with further segregation of felons from misdemeanants. The harder labor will be devolved upon felons.

12. At the Pacific Branch of the United States Military Prison, Alcatraz, Calif., where are confined only those general prisoners who have been convicted of statutory or common-law crimes or misdemeanors alone or in connection with purely military offenses, the application of these regulations will be deferred until it is determined by experience whether the system should be extended to misdemeanants undergoing sentence; but at this branch prison felons and misdemeanants will be segregated so far as practicable, and detachments to Angel Island and other places in the harbor and to near-by posts for hard labor in construction, improvement, and other public work will, so far as practicable, be drawn from the felon class.

13. The method of dealing with prisoners here outlined is an innovation. The system prescribed is to a certain extent tentative and experimental, and will be extended or its operation circumscribed in the future as experience may suggest.

14. The commandant of the United States Military Prison at Fort Leavenworth, Kans., and of its Pacific branch, and the prison officer, Castle William, Fort Jay, N. Y., will report by letter to the Judge Advocate General of the Army, who will have direction and control, under the Secretary of War, of these prisons and their administration. Direct correspondence with chiefs of staff corps and departments, as now authorized, will continue.

15. It is the policy of the War Department to separate, so far as practicable, general prisoners convicted of offenses punishable by penitentiary confinement from general prisoners convicted of purely military offenses or of misdemeanors in connection with purely military offenses. In furtherance of this policy reviewing authorities will designate a penitentiary as the place of confinement of general prisoners sentenced to be confined for more than one year upon conviction of offenses punishable by confinement in a penitentiary under some statute of the United States or under some statute or other law in force in the locality in which the offense was committed (see 97th Article of War), except in individual cases in which the proved circumstances show that the holding of the prisoners so convicted in prison associations with misde-

meanants and military offenders will not be to the detriment of the latter. For general prisoners to be confined in penitentiaries under the foregoing rule, reviewing authorities in the United States or Hawaii will designate the United States Penitentiary at Leavenworth, Kans., as the place of confinement, except that such prisoners as are residents of Hawaii, Porto Rico, and the Canal Zone may be confined in local penitentiaries; and reviewing authorities in the Philippine Islands will designate the penitentiary at Bilibid, Manila, P. I., as the place of confinement.

[2079146, A. G. O.]

By order of the Secretary of War:

LEONARD WOOD,
Major General, Chief of Staff.

Official:

GEO. ANDREWS,
The Adjutant General.

You will observe that this order authorized and directed the organization of a maximum of four disciplinary companies at Leavenworth prison to be composed of general prisoners serving sentences for purely military offenses, and further authorized one disciplinary company at Castle William, Fort Jay. It directed that members of the disciplinary organization were to be taken out of prison garb and put into uniform. They were to be known by name and not by number, separated from other prisoners, permitted to render and receive the military salute, and to be armed, equipped, and trained as infantry—all for the purpose of developing their own self-respect and fitting them for restoration to duty. Disciplinary companies were organized rather promptly in the remaining months of 1913 and January, 1914.

It was not until February 6, 1914, that the pending bill to convert the United States Military Prison into a disciplinary barracks was favorably reported by Senator Chamberlain with some amendments made by the Senate Military Affairs Committee of which he was then the chairman. The bill failed to pass at that session of Congress. But we got partial relief in the act of April 27, 1914 (38 Stat. 346, 352), in the form of a rider on the annual Army appropriation bill, inserted on my insistent recommendation, authorizing a suspension of the sentence of dishonorable discharge when there was reasonable hope of reclaiming the man. As to all men thereafter convicted and sentenced, with a suspended dishonorable discharge, we could proceed to restore the men by remitting the dishonorable discharge, of which the execution had been suspended, and in this way send them back to their organizations. This was followed by instructions to commanding generals, issued on June 9, to suspend sentences of dishonorable discharge whenever there was a probability of reclaiming the soldier to honorable service (G. O. 45, June 9, 1914). In this order it was announced that "the object in seeking the legislation authorizing the suspension of dishonorable discharge was to afford a plan of giving soldiers convicted of purely military offenses an opportunity to reclaim themselves and gain restoration to the colors."

But there remained, of course, the large class already in confinement whose sentences of dishonorable discharge had already been executed and who did not come within the provisions of the foregoing act of April 27, 1914, and General Order No. 45. They could only, under the accepted construction of the statute, get back into the service under the legislation of August 22, 1912, heretofore noted—that is, by reenlistment for a full term. Not being willing to wait further for the enactment of the pending bill, which would have

included them, I directed a study of section 1353, Revised Statutes' which is section 6 of the original prison act, to see if there could not be deduced therefrom this power of restoration as to inmates of the prison whose discharges had already been executed. Gen. Ansell was assigned to that study. With his usual ability, he analyzed the statute and presented a strong brief contending for the construction that the act was sufficient to reach this class of prisoners. Secretary Garrison, then in office, gave the opinion his careful consideration and eventually approved it March 7, 1914, though, I think, not without doubt as to its legal correctness, but in the belief that Congress would ultimately validate this procedure by giving it the necessary statutory sanction. From that time on we had recourse to both courses—i. e., to reenlistment for the full term, and to restoration to an old enlistment, in dealing with the inmates of this prison.

I want to remark here that I have found in Gen. Ansell's testimony the statement that there was great opposition in the War Department to this construction. All that I can say is that with my very keen interest in it, I never heard of great opposition. I know that Secretary Garrison gave the legal question considerable study, and that he reserved his action for about two weeks before he gave his approval of the opinion; but that there was such opposition on the part of the War Department from which you could deduce a military autocratic character upon the part of the officers of the War Department at that time, as you are invited to do, I doubt very much. Certainly, I did not know it.

Senator WARREN. Were there any unfavorable comments from prior officers, outside of the department?

Gen. CROWDER. His statement was that within the department there was opposition.

Senator WARREN. Do you know of any supposed opposition from the outside, from officers in command?

Gen. CROWDER. No; though I think a great majority of officers viewed this reform with apprehension. They believed in punishment for deterrent effect.

The single contribution that Gen. Ansell made to the scheme of prison reform was his opinion on section 1353, Revised Statutes. Before he had entered upon his study, 63 inmates of the prison had been recommended for reenlistment in the fiscal year ending June 30, 1913, and nearly twice that number before the date of the rendition of his opinion in 1914. The first man restored under his opinion was restored on March 14, 1914. The record for the fiscal year ending in 1914 at the Leavenworth Prison shows that 40 per cent of the men discharged from the prison in that year were recommended for reenlistment. Many preferred that course to restoration. From March 14 to June 30, 1914, 39 men had been restored.

Prior to the enactment of the bill repealing the prison act and substituting the disciplinary act the reforms carried out by Executive orders and by acts of Congress may be summarized as follows:

(1) Classification and segregation of prisoners, December, 1911.

(2) Reenlistment of inmates as authorized by act of August 22, 1912.

(3) Organization of disciplinary battalions and companies and inauguration of military training for purely military offenders, September 17, 1913.

(4) Instruction to department commanders to suspend sentences of dishonorable discharge inaugurated under act of April 27, 1914.

(5) Disciplinary battalion established on October 13, 1914, at branch military prison at Alcatraz, extending to misdemeanants confined there the privileges of military training and instruction.

So it was that the system of reform was already pretty well established in its more essential features before Congress finally came to enact the bill for the repeal of the prison statute, which it did on March 4, 1915, as a rider on the Army appropriation act. But the act of that date did abolish the penal character of the institution, change the name, and convert the institution in a very real sense into a military reform school, where every inmate could earn, by good conduct, irrespective of the length of his sentence, an honorable restoration to duty with the colors, and an honorable discharge.

Senator WARREN. At that point: Do you propose to comment upon the old law and the new law, at some place in your remarks?

Gen. CROWDER. Yes.

Senator WARREN. I wish you would do so.

Gen. CROWDER. There remained little to be done under the act of March 4, 1915. We reorganized the disciplinary battalion and companies (G. O. 21, April 13, 1915, drafted by me) and on May 18, 1915, issued parole regulations in aid of the execution of so much of the act of March 4, 1915, as authorized the Secretary of War to establish a system of parole for inmates of disciplinary barracks. This parole provision was a separate rider and not a part of the prison section proper.

I realized that this scheme was not complete unless we had some corresponding measure of relief for those who could not be recommended for either reenlistment or restoration, and I sought this parole rider as a separate rider to this bill. It gave authority to the Secretary of War to establish a system of parole for military prisoners; and the regulations were issued under it, providing for the release of men back into civil life who had served at least half of their sentences.

Senator WARREN. That was a companion piece to what had preceded?

Gen. CROWDER. A companion piece, so as to cover the entire population of the prison.

Senator WARREN. Yes.

Gen. CROWDER. Under this system as thus built up and as it exists to-day, the disciplinary barracks at Leavenworth and the two branches at Alcatraz and Governors Island are sharply to be distinguished from the ordinary prison, and confinement therein is sharply to be distinguished from penal servitude. They are the reform schools of the Army, the primary purpose of which is to fit inmates for honorable restoration to duty with the colors or for useful employments in civil life.

Senator WARREN. Is Alcatraz used also for the Navy and the Marine Corps?

Gen. CROWDER. No, sir.

Senator WARREN. Just for the Army?

Gen. CROWDER. It is exclusively an Army barracks now. The essentials of the system of military penology are:

1. The indeterminate sentence (effected by means of a suspended sentence of dishonorable discharge, remission of the unexecuted portion of the sentence to confinement, and restoration to duty or permission to reenlist);

2. Fitting men for restoration by training them and stimulating their self-respect through—

(*a*) Military training and instruction in the disciplinary battalion.

(*b*) Taking them out of prison garb, putting them into uniform; not calling them "convicts;" giving them the privilege of the military salute; treating them as soldiers under intensive military training.

(*c*) Industrial as well as military training; all tending to stimulate the soldier's self-respect and sense of his own value, and giving him opportunity for greater usefulness in his organization, and to earn more money upon return to civil life, and become a better citizen.

Senator WARREN. As I understand you, that took the place of hard labor?

Gen. CROWDER. Of all of what is described by the phrase, "penal servitude."

Senator LENROOT. In that connection, will you tell us how they are housed?

Gen. CROWDER. I can, but at this place I would be glad if you would let me finish this.

Senator LENROOT. Yes; I do not want to disturb the order of your statement.

Gen. CROWDER. The next is:

3. The parole, by which the man's fitness for restoration to civil pursuits may be tested; and

4. Honorable restoration to duty with the colors.

Ignoring the reenlistments, which have been considerable in number, and dealing only with restorations, the following is the record of the men restored to duty from the disciplinary barracks and its branches for the years 1914 to 1919, inclusive:

Fiscal year 1914, 39; 1915, 139; 1916, 193; 1917, 436; 1918, 678; 1919, 1,417; total, 2,902.

Senator WARREN. May I ask you right there, what has been the course of those men afterwards restored? Have you any record kept so that you could give us what, generally, is the effect; that is, what they have done to justify the leniency, after they got back into service?

Gen. CROWDER. At the time Secretary Garrison approved the scheme and issued General Order No. 56, he transferred the administration of the prisons from The Adjutant General's Department to my department, and placed me in charge, and I followed this matter that you bring up, very closely. My men were going back and completing their terms of enlistment with a lower desertion rate than was made by men who reached their organizations through the recruit depots by ordinary processes of enlistment. Not infrequently they became noncommissioned officers. But this act of March 4, 1915, by a circumstance which you will remember, for I think you served on the conference committee, Mr. Chairman, wrested the control of the barracks régime from the Judge Advocate General's Department and restored it to The Adjutant General's Department, and since that date I have not had the means of following these restored men, and for learning what records they had made.

Completing what I had to say, 2,448 men were restored to duty between April 6, 1917, and August 31, 1919. The average sentence in years actually served by these men so restored is less than six months, or 0.49 of a year. Two thousand four hundred and forty-eight men restored served less than six months (average) in the disciplinary barracks. Within this average the prison commandant and his officers had judged that their reformation was so complete as to justify their being restored to duty with the colors.

Senator WARREN. You will give it as your judgment, will you, that those men restored, taking them by and large, as a lot, have rendered as good a class of service as the men who have been newly enlisted in the Army?

Gen. CROWDER. That was true up to the date when I lost the actual supervision.

Senator WARREN. Do you know anything to the contrary?

Gen. CROWDER. I do not know anything to the contrary since, and I know this, further, that during the time I was in charge I followed the actual expense to the Government of this process, and in comparison with the bringing of the men to the colors by enlistment through the recruit depots, the expense of this system was less per capita than the expense under the recruiting system.

Senator WARREN. We know that the expense of recruiting is excessive. Could you furnish us, later, so that it could go into your testimony, any statistics or any proper testimony as to what has been the change in these men since they went under the control of The Adjutant General?

Gen. GROWDER. The Adjutant General would have to furnish that information. I could not give it.

Senator WARREN. Could you give us any approximate idea of the average sentence of these men you have been speaking of?

Gen. CROWDER. Yes; by calling your attention to the average length of sentences imposed by general courts-martial for the entire period, namely, three and one-half years, about. In other words, the average sentence of three and one-half years was served, by these men, by an average confinement of less than six months. That would be the only comparison you could make that would furnish you an approximation of the amount of remission they earned by going to the disciplinary barracks and entering upon this course of military instruction.

Senator LENROOT. That average would evidently not apply, though, because for the longer sentences there would be a less number that would have the advantage of it.

Gen. CROWDER. It is true, and is published in my letter of March 10, which I shall refer to later as the Wigmore letter, prepared by Col. Wigmore and Maj. (now Lieut. Col.) Rigby, but signed by me, that certain men serving even these long-time sentences earned their restoration to duty in less than six months. That is already in the record before you. That has already been submitted for the consideration of this committee.

Senator Lenroot asked me a moment ago about the character of prison construction. Unfortunately the showing is not as favorable as I wish it might be. The chairman of the committee will have no difficulty in recalling when that prison construction was commenced. They laid out the prison just as penitentiaries are ordinarily con-

structed, with cell wings and doors, and all of the indicia that mark penal servitude. If you visited Leavenworth you would find a battalion of four companies in uniform marching all over the reservation under drill and instruction preparatory to being restored to duty, but when released from drill they return to places like that. The best that we could do was to take off the cell doors and leave them unobstructed access to the galleries that are found in each tier. But the prison construction was so far advanced—so nearly completed, in fact—that it was impossible to change it.

Senator LENROOT. Are these military prisoners kept in an entirely separate portion of the prison from other prisoners?

Gen. CROWDER. The segregation was complete during the time I administered the prisons. We found some barracks in the prison inclosure, and we kept these prisoners under military training in those barracks, but I do not think it has been possible to do that during the period of this war.

Senator LENROOT. Are there any of them in the same buildings at all with other prisoners?

Gen. CROWDER. I think there are.

Senator LENROOT. You think there are?

Gen. CROWDER. I think there are.

Senator LENROOT. So, to that extent, they have the same character of——

Gen. CROWDER. Yes; that is one unfortunate thing.

Senator LENROOT. Have any recommendations been made to Congress in that matter?

Gen. CROWDER. I think not. It was so impracticable, so improbable, rather, that Congress after appropriating the large sums of money that it had, under this mistaken theory of military penology, to construct what was in fact a military penitentiary, would condemn all of that property and rebuild, in accordance with the new idea; certainly not until the new idea had been tested.

Senator LENROOT. Would you say, however, that it was extremely important to carry out this reform?

Gen. CROWDER. Very important. I would like to think that we had military barracks everywhere to answer the purpose of these military reformatories, to give this idea a chance, and to keep this class of prisoners from association with men who are irreclaimable.

Senator WARREN. What is the distance from these quarters you have described; that is, from the regular Leavenworth Penitentiary to which criminals of all kinds are sent?

Gen. CROWDER. They are at the opposite end of the reservation, and are separated by a distance of 3 or 4 miles.

Senator WARREN. Both on the same side of the river?

Gen. CROWDER. Yes; but both on the military reservation.

The net result of our disciplinary barracks administration is that out of 13,593 men passing through the United States Disciplinary Barracks between April 1, 1917, and July 31, 1919 (including 2,101 in confinement on April 1, 1917, and 11,492 sentenced to the barracks between April 1, 1917, and July 31, 1919), only 3,839 remained in confinement in the various barracks on July 31, 1919; being only 1,738 more than were in the barracks at the beginning of the war, in spite of the great increase in the Army during the war, and of the number of unfit men of various kinds who were necessarily brought into the service through the operation of the draft.

Senator WARREN. On that date, July 31, can you tell us how many men we had in France?

Gen. CROWDER. I have not the statistics of the American Expeditionary Forces.

Senator WARREN. I wonder whether we could get that?

Gen. CROWDER. I think the recalling of Gen. Bethel would put you in the way of getting that information.

Senator WARREN. Would it be convenient for you to suggest to Gen. Bethel that we would be glad to have him furnish the committee with that information?

Gen. CROWDER. Yes, sir.

Senator WARREN. You would like to have it, Senator?

Senator LENROOT. Yes; I think so.

(The information desired is contained in the following note by Gen. Bethel:)

In France general prisoners were confined in two camps—at general intermediate storage depot (Gievres) and at St. Sulpice, near Bordeaux. Both these camps were under the jurisdiction of the commanding general Services of Supply. On June 13, 1919, that officer was directed to send all general prisoners to the United States as soon as transportation was available. On June 30, there remained in the two camps 108 general prisoners; on July 31 there were but 2. An indeterminate number were en route to the United States on July 31, 1919, either at Brest, in France, or on the seas. It is known that on August 12 there were but 34 remaining at Brest.

Gen. CROWDER. Although quite a proportion of the sentences to the disciplinary barracks were, nominally, for long terms of years, yet, in fact, the actual sentence served by the 9,754 men who were released from the barracks (including the men restored to the colors about whom I was talking a moment ago) during the period of the war, as above stated, averaged only 1.06 years.

During the month of August, 1919, the number of men in the barracks was further reduced, so that on August 30, 1919, only 3,728 men remained on confinement, or only 1,627 more than at the beginning of the war.

The purpose of the disciplinary barracks is to aid in the restoration of offenders; to make them, if worthy, good soldiers and good citizens. The period that a man is detailed in the barracks lies wholly in his own hands.

Senator WARREN. You rather emphasize what you stated earlier about these sentences all being conditional. We can understand that was as to time; that is, they should not exceed a certain time?

Gen. CROWDER. I made that plain, I think, by this statement. Those are maximum sentences. There is authority, of course, to hold the man for the entire period for which he is sentenced. It is written into the law by the very terms of the statute, authorizing suspension of the dishonorable discharge, that these men are there for the purpose of earning remission of that particular sentence of imprisonment and dishonorable discharge and getting them back into the service. This gives the sentence an indeterminate character. And let me emphasize it, because I may forget it, there is no minimum sentence.

Senator LENROOT. Are these sentences always of the same nature?

Gen. CROWDER. They are all of the same nature.

Senator LENROOT. They are all fixed sentences, but under the operation of the law they may be remitted?

Gen. CROWDER. In terms, yes—5, 10, 20, 40 years—but there is where the misapprehension has come. A 40-year sentence may, with good conduct, become a 6-months' sentence. I want this record to show that.

Senator LENROOT. You do not use that word "indeterminate" in the ordinary sense in which it is used in criminal law.

Gen. CROWDER. No; I am perfectly willing to say that, provided I do not allow anybody to think for a moment that it is not just as effective in the form in which we have it.

Senator LENROOT. It is just as effective, but it is not used in the sense in which the word "indeterminate" is used in the civil law.

Gen. CROWDER. No; the word "indeterminate" does not occur in our Articles of War at all. In this connection I find that I have some statistics here that answer the inquiry by Senator Lenroot. I have a statement showing the number of men restored to the colors from disciplinary barracks between April 6, 1917, and August 31, 1919, with the length of the average original sentence and the average sentence served. At the main branch disciplinary barracks, Fort Leavenworth, Kans., 1,410 men with an average sentence in years adjudged of 8.8 years, the average sentence in years actually served was 0.43 of a year.

Senator LENROOT. That is what I wanted to know.

Gen. CROWDER. At the Atlantic Branch of the United States Disciplinary Barracks at Fort Jay, N. Y., 470 men with an average sentence in years adjudged of 2.98 years, actually served an average sentence of 0.59 of a year.

At the Pacific Branch of the United States Disciplinary Barracks at Alcatraz, Calif., 568 men with an original average sentence adjudged of 2.17 years, served actually 0.57 of a year.

The total shows: Total number of men, 2,448, with an average sentence adjudged of 5.73 years, serving an average actual sentence of 0.49 of a year.

In tabular form the statistics are in this statement:

Statement showing number of men restored to the colors at United States Disciplinary Barracks between Apr. 6, 1917, and Aug. 31, 1919.

	Fort Leavenworth, Kans.	Atlantic Branch, Fort Jay, N. Y.	Pacific Branch, Alcatraz, Calif.	Total.
Number	1,410	470	568	2,448
Average sentence in years originally adjudged against men so restored	8.8	2.98	2.17	5.73
Average sentence in years actually served by men so restored	.43	.59	.57	.49

NOTE.—This statement does not include 124 men who during the period stated were restored to the colors and at once honorably discharged, and 13 men who during the same period were restored to the colors and discharged under paragraphs 139 and 150, Army Regulations, for the reason that the necessary information concerning these men is not available.

JOHN P. DINSMORE,
Lieutenant Colonel, Judge Advocate.

Senator LENROOT. Does any reason occur to you why there should be this difference in those three prisons? I notice in one of them you have a lower average for a longer term. In others you have a high average for a shorter term.

Gen. CROWDER. During the period of the war it seems Leavenworth was designated generally for the longer-term men, and the shorter-term men were held at Alcatraz and Jay. Perhaps that explains why the average sentence adjudged was so small for the prisoners confined at the Atlantic and Pacific branches.

Senator LENROOT. No; that is not what I gathered from your reading of those statistics. You have a longer average for the shorter average term in one case.

Gen. CROWDER. Yes; it has worked out that way.

Senator LENROOT. I do not see why it should be so.

Gen. CROWDER. Forty-three hundredths of a year at Leavenworth, 0.59 of a year at Fort Jay, and 0.57 of a year at Alcatraz.

Senator LENROOT. In one case the average sentence for your lowest average is very much higher than in the other case of the highest average.

Gen. CROWDER. I should say that the only reason for that was that the policy adopted at these different places was not uniform.

Senator LENROOT. That is what I was getting at, whether it was a difference of policy and recommendation.

Senator LENROOT. I should judge that it might indicate a more liberal policy in one institution than in the other.

Gen. CROWDER. It would seem to show a lack of coordination.

Senator WARREN. There might be a little difference in the character of the men.

Senator LENROOT. Yes.

Gen. CROWDER. It shows a lack of coordination of the prison administration in the three places, I think.

Senator LENROOT. Yes.

Gen. CROWDER. Something of that kind must explain it. I had hoped to find here some statistics which I had gathered which might possibly explain some of these long-term sentences—5, 10, 15, 25, and even 40 years—for the offense of absence without leave.

I called upon the port of embarkation at Hoboken for the number of men who were absent without leave from their organizations at the time they were expected to go up a gang plank and embark for Europe, because I knew the problem was concentrated largely there. These are some of the men of whom you have heard the story that they went home to see sick wives, fathers and mothers, and sweethearts. A great picture has been drawn for the contemplation of the American people of the cruelty toward these men.

Here are the statistics, and they show that the number of men who were absent without leave at the port of embarkation at Hoboken for the calendar year of 1918, at the time their organizations were due to embark for the theater of war, was approximately 14,098. I have no figures available for the year 1917, but the number of men transported to Europe that year was comparatively small. I can only explain these excessive sentences in this way: The call had come from Europe as early as March that the English had their backs to the English Channel and the French had their backs to Paris. The call was for bullets rather than bread.

As Provost Marshal General I had to furnish three times as many men as the schedule called for for April of that year; four times as many as the schedule called for for May; about the same percentage for June. The culminating peak was reached in July, during which

month I furnished, under call, 401,000 men. The country was worked up to a higher pitch of excitement and insecurity than ever before. The officers who were expected to go abroad with their organizations and win battles found their commands disintegrating at the ports of embarkation. Unquestionably this fact affected the administration of military justice, and led to many of these heavy sentences. No one, I am sure, wishes to conceal or obscure the fact of heavy sentences. They were given. But little attention has been paid thus far to what must have been in the minds of the men who were adjudging these sentences, to do something at a critical period of the war for deterrent effect, knowing full well that this system of military penology which I have described to you would correct the evil of disproportionate punishment before any man had entered upon the execution of the excessive portion of his sentence; and I think you gentlemen may accept this as true, that during the period of the war, and ignoring for the moment any illegal convictions that may have taken place, no man has ever served one day of the excessive portion of the sentence adjudged by court-martial.

Senator LENROOT. That is, you mean if it was adjudged, it was reduced before he began his service?

Gen. CROWDER. Before he began the service of the excessive portion; and I think that point can not be too forcibly put. At least, I would like to have it controverted if it is not true. That is my best judgment, from a rather close study of the question.

Senator LENROOT. When a man was convicted and sentenced for 40 years, what became of him then, immediately?

Gen. CROWDER. He is held at the point of trial, or at some convenient place to which he may be sent, awaiting orders of transportation to the designated place of serving sentence. It may be one of these three disciplinary barracks, or it may be some place of execution provided by the commanding general of the American Expeditionary Forces in France; or in Siberia it may be some improvised place; or at Archangel an improvised place.

Senator LENROOT. When does the sentence begin?

Gen. CROWDER. It is reckoned from the date of approval of the sentence.

Senator LENROOT. If a man is sentenced to a year, and he remains 60 days in the guardhouse, do I understand that he serves a year from the date of the approval of the order additional?

Gen. CROWDER. No; he gets credit for all confinement served after the date of the approval of his sentence.

Senator LENROOT. Then, in effect, the service of the sentence begins——

Gen. CROWDER (interposing). On the date of approval.

Senator LENROOT (continuing). Not with the approval. In effect, I say, the service begins immediately upon the verdict of the court-martial?

Gen. CROWDER. In effect, that.

Senator LENROOT. Yes.

Gen. CROWDER. Unless there is some delay interposed between the action of the court and the action of the reviewing authority.

Senator LENROOT. So that, while technically you are correct, in a 40-year sentence he does enter upon the service of the sentence before there has been any reduction?

Gen. CROWDER. That is true; but I was careful to say before, he had not entered upon the execution of the excessive portion of his sentence—not the sentence, but the excessive portion. That is what I said.

Senator LENROOT. He could not enter upon the excessive portion of a 40-year sentence. He would have to serve a year——

Gen. CROWDER (interposing). I should assume that there was a period of confinement in all those cases that was justified, whereas the entire period was not justified, and that he had not entered upon the execution of the excessive portion at the time when clemency was granted.

Senator LENROOT. He could not have both. If it was reduced to 20 years, he could not enter upon the excessive portion until 20 years had elapsed. Suppose that it was reduced to two years, or three years; he could not enter upon the excessive portion until after two years.

Gen. CROWDER. No; the point that I wanted to get before the committee was that if all these sentences had been excessive, the prisoner had not suffered by it except in name, because he had not served any part of the excessive portion at the time clemency reached him.

Senator LENROOT. That would be almost inevitably true, would it not, in every case?

Gen. CROWDER. I do not believe that the people of this country understand that.

Senator LENROOT. You think that the people of the country believe——

Gen. CROWDER (interposing). I think there is a vast amount of misapprehension in the minds of the people of the country, that men have actually executed—served out—these excessive sentences.

Senator LENROOT. How could they have served out a 20-year sentence which was imposed only two or three years ago?

Gen. CROWDER. But suppose it was a 20-year sentence where only one year was justified. It would then be a question as to whether the man had been kept in prison one year. That is the point that I want to cover, that I do not believe there are any of them—and I disregard illegal convictions where no sentence would have been justified—taking the legal convictions, I do not believe there are any of them where any part of the sentence in excess of what was justified has been served.

Senator LENROOT. Beyond the time of the proper sentence?

Gen. CROWDER. No.

Senator LENROOT. I see. I think that is probably true.

Gen. CROWDER. I think that is absolutely true.

Senator WARREN. Detention in the guardhouse has been only, I suppose, until they could send them under proper guard?

Gen. CROWDER. Yes. Perhaps there may have been inexcusable delay in some cases.

Senator WARREN. I wanted to bring that up, because that has been charged, that men have been put in uncomfortable places and sent to general disciplinary barracks.

Gen. CROWDER. Perhaps this is the proper time to refer to a distinction which I find it very important to keep in mind in expressing some judgment upon these court-martial sentences. I do not see

how we can hope for a discriminating, fair, and sane judgment unless we keep in mind that courts-martial try common law and statutory offenses as well as purely military offenses. At the time I made my inspection at Leavenworth in 1911, a time which reflected peace conditions and peace-time administration of military justice, the percentage of common law and statutory offenders only, convicted by courts-martial, to the total number in confinement there was 8 per cent. In 1917 the figures show that it was 10 per cent at Fort Leavenworth Barracks; and in 1918, 19 per cent; and without pursuing these statistics further it will be sufficient to say that during the war period the number of soldiers convicted of common law or statutory offenses on the one hand as compared with military offenses on the other, was 14 per cent.

Senator LENROOT. How do you explain that? Would not one assume, rather, that the reverse would be the case, that the percentage would be smaller?

Gen. CROWDER. I do not undertake to explain why the percentage is higher for the war period. My point is made when I call attention to the fact that the proportion between military offenses and civil offenses is, for the war period, about 86 of the former to 14 of the latter; and for the peace period the proportion of military offenses is even greater. Eighty-six per cent of the cases you are called upon to consider in providing a code of military justice are essentially military cases, and 14 per cent common law and statutory cases. And the fact that affects my judgment when I come to consider this question of an appellate tribunal—and I am going to refer to it later—I am just reserving the question now, and saying only that I think the fact profoundly affects the conclusion to be reached as to the character of the appellate tribunal, that in time of war not more than 14 per cent of the cases that would come before such a tribunal are common law and statutory cases, and that 86 per cent of the cases that would come before it are offenses against the discipline of the Army. I say I just reserve that to be discussed when we come to discuss the question of appellate power.

Senator LENROOT. I want to go back just for one question: With reference to the excessive sentences, including those for absence without leave, did I understand you to state that those were solely for absences without leave at the port of embarkation?

Gen. CROWDER. No; I just gave that as one illustration. I would not like to have the thought rest in anyone's mind for a moment that I was trying to cover the case——

Senator LENROOT. No; I just wanted to know what the fact was.

Gen. CROWDER. Would you like to have in the record at this time a statement showing the number of men confined in disciplinary barracks and penitentiaries during the war?

Senator LENROOT. I think that is already in the record, but if it is not I think it ought to go in.

Gen. CROWDER. I doubt very much whether it has been presented by any other witness before you.

Senator LENROOT. Then it may go in.

Gen. CROWDER. Before the war was declared, namely, on April 1, 1917, there were in the three disciplinary barracks 2,101 men, and 212 men in the penitentiaries.

Between April 1, 1917, and July 31, 1919, there were sent to the disciplinary barracks 11,492, and to the penitentiaries 1,352.

So that the total is 13,593 in the disciplinary barracks, as against 1,564 in the penitentiaries.

Of the men remaining in confinement on July 31, 1919, there were 3,839 in the disciplinary barracks and 835 in the penitentiaries.

Now you will say, or will have the right to say, that these figures are not consistent with my percentages of convictions mentioned a while ago. The explanation lies in this, that in the 1916 revision of the Articles of War it was provided that desertion in time of war and repeated desertion in time of peace should constitute felonies, and a good many of those men who are serving in the penitentiaries are deserters in time of war or repeaters, and not the usual common law and statutory felon.

Senator LENROOT. Where is the line drawn between absence without leave and desertion?

Gen. CROWDER. The distinguishing element is the intention not to return, or to permanently abandon the service.

Senator LENROOT. I knew that, but the difference in administration is what I was getting at.

Gen. CROWDER. The effort we make in practical administration, to draw that line. There is one merit about the pending Chamberlain bill that ought not to escape notice, and that is the creation of what the British call short-time desertion. It is provided for in the Chamberlain bill, but not under that name. If we had had a statute of that kind, these more than 14,000 men that were absent at Hoboken at the time they were expected to embark could have been tried for short desertion, or an abandonment of the command at a time of perilous duty. They distinguish that in the English articles as short-time desertion, and in effect, though not in name, it is made short-time desertion in the Chamberlain bill, and I want to commend that part of the bill. I believe it would be an improvement, and if we had that legislation these absentees would have been "short-time deserters," punishable under article 55 of the Chamberlain-Ansell bill with death, and presumably then the voice of criticism hurled against the sentences of lesser severity actually imposed upon these men for absence without leave would not have been so audible.

I now come to the second subdivision of my remarks, the Bill of Rights and its applicability or nonapplicability to military accused persons.

Where I have undertaken to state the views of the critics of the present system, I have resorted to quotation marks, and given the page reference to the hearings, in the interest of absolute, unerring accuracy.

Gen. Ansell says on page 125 of these hearings:

> It had long been and still is the contention of the so-called lawyers of the War Department that not one single clause or legal principle in the Constitution, in the Bill of Rights, or any other of these ancient documents that have come down to us as a part of our birthright, to secure our liberties against government, not one is applicable to courts-martial—including this great protection against second trial. (P. 125.) (The double jeopardy principle of the Constitution.)

Frequent references of this character appear in the literature of this court-martial controversy. It was expected that, as announced, it would shock the country, and it has shocked the country. I want the attention of the committee to the following propositions:

A. It is true that the Congress of the United States has for more than a century legislated in substantial accord with the view which Gen. Ansell condemns.

Permit me to show just what Congress has done in this regard by citing the several clauses of the Bill of Rights and the corresponding provisions of the Articles of War enacted by our Congress.

BILL OF RIGHTS.	ARTICLES OF WAR.
No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces, or in the militia, when in actual service in time of war or public danger. (Fifth amendment.)	By express provision this amendment does not apply to the land forces.
Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb. (Fifth amendment.)	No person shall be tried a second time for the same offense. (Art. 87, Code of 1806; art. 40, Revision of 1916.)
Nor shall be compelled in any criminal case to be a witness against himself. (Fifth amendment.)	No witness before a military court, commission, court of inquiry, or board, or before any officer, military or civil, designated to take a deposition to be read in evidence before any military court, commission, court of inquiry, or board, shall be compelled to incriminate himself or to answer any questions which may tend to incriminate or degrade him. (A. W., 24; Revision of 1916; act of Mar. 2, 1901; 31 Stat., 950, 951.)
Nor be deprived of life, liberty, or property without due process of law. (Fifth amendment.)	What is due process of law in criminal prosecutions? It includes jurisdiction by trial court of person and subject matter, notice of charges upon which an accused is to be tried, opportunity to be heard thereon in a fair trial and under equal and uniform rules of procedure. As said in Reeves *v.* Ainsworth (291 U. S., 296, 304): "To those in the military or naval service of the United States the military law is due process." In other words, due process of law is afforded the accused when he is tried by such procedure as acts of Congress and the common law, military, have provided.
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. (Sixth amendment.)	No person put in arrest shall be continued in confinement more than 8 days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within 8 days after his arrest, and that he is brought to trial within 10 days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within 30 days after the expiration of said 10 days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. (Revision of 1916, A. W. 70; origin, first sentence, art. 79, Code of 1806, rest of provision, act of July 17, 1862.)

While the trial is not required by statute to be always public, it is the almost universal practice, departed from only in rare instances and in case of necessity, where the evidence must because of the military situation be kept secret, or because it is otherwise of a character which requires the court to sit behind closed doors.

By an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law. (Sixth amendment.)

Held in ex parte Milligan (71 U. S. 2, 123) not to apply to courts-martial, in language as follows: "The sixth amendment affirms that 'in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury,' language broad enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before anyone can be held to answer for high crimes, 'excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger;' and the framers of the Constitution doubtless meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth."

And to be informed of the nature and cause of the accusation. (Sixth amendment.)

See A. W. 70, last above quoted, and act of July 17, 1862.

To be confronted with witnesses against him. (Sixth amendment.)

Congress has legislated in the teeth of this provision, authorizing depositions in all cases not capital. The first enactment on this subject is found in article 74 of the Code of 1806; carried forward in the Code of 1874, article 91, and, in both codes, gave this authority to take depositions to both Government and accused persons upon reasonable notice, as a right. The existing provision is found in articles 25 and 26 of the existing code and continues in that code as a right, not a privilege. So it is that from the very beginning of our Government down to the present time Congress has recognized the inapplicability of this particular clause of the Bill of Rights to military accused persons.

Senator LENROOT. I would like to ask you right there what you have to say, aside from the practice adopted by Congress, or of the proper construction we may say, given by Congress to that, in view of what was said in the Milligan case? The Milligan case draws the distinction, or rather goes back to the inception of a military court, in the way of indictment or information, as sustaining its position in the right of trial by jury. But do you think that same thing should apply in case of the right to be confronted with the witnesses?

Gen. CROWDER. Yes; I am coming to that, in the language of the Supreme Court itself.

Senator LENROOT. That is what I was coming to.

Gen. CROWDER. The next is:

To have compulsory process for obtaining witnesses in his favor. (Sixth amendment.)	Right fully secured by article 22. Judge advocates have the same power to compel witnesses to appear and testify as criminal courts of the United States. Failure of civilian witness to obey process is made punishable by A. W. 23, and such failure of military witness is likewise punishable. (Origin of A. W. 22, act of Mar. 3, 1863, and of A. W. 23, act of Mar. 2, 1901.)
And to have the assistance of counsel for his defense. (Fifth amendment.)	Existing article of war 17 provides that "The accused shall have the right to be represented before the court by counsel of his own selection for his defense if such counsel be reasonably available, but should he for any reason be unrepresented by counsel, the judge advocate shall, from time to time throughout the proceedings, advise the accused of his legal rights." (Judge advocate to protect accused, act of Apr. 10, 1806, art. 69. Rest of provision, act of Aug. 29, 1916.)

Now, you will at once say that that is not the substantial right to counsel that is enjoyed by a civil accused in civil courts, and I admit it. Let us have no question about it. The provision here "reasonably available," is sought to be eliminated in the bill before you (art. 22) and it will bring up for consideration the case that I presented to the committee at the time the 1916 revision was under consideration, an actual case of an officer being tried by a court-martial in Alaska for embezzlement, making an application for the professor of law at the Military School, Staff College, at Leavenworth, to be sent all the way to Alaska for his defense. It might result in an accused person undergoing trial in Mindanao, in the Philippine Islands, applying for some man serving in Alaska to act as his counsel. Upon that explanation, the Military Committee of the House, which first wanted to grant the right of counsel in absolute terms, qualified it by the language "If such counsel be reasonably available." The corresponding provision of the pending bill is that military counsel of the accused's selection shall be assigned, unless the appointing authority shall certify that "serious injury to the service" would result from the detail. What is serious injury? Is it to be measured in dollars and cents of transportation or mileage? Is one class of duty to be measured against another? Are we here in the field of prejudicial error; or, because compliance with a statute is involved, are we in the field of jurisdictional error?

No provision is made in the existing code for civil counsel, because it is not of record, I believe, anywhere, nor do I believe it is true that an accused who sought to be represented by a civil counsel before a court-martial was ever denied that right. You have gone further in the pending bill and have provided that that civil attorney shall be paid by the Government if the accused is found not guilty, I believe, and if he is convicted civil counsel is to be paid by the man. I think that is the provision of the pending bill. But what I wish to emphasize is that Congress did not fail, in the revision of 1916, to extend to an accused right of counsel, and leave you to judge of the

adequacy of the existing provision and the necessity of strengthening that provision.

(Reading:)

Excessive bail shall not be required. (Eighth amendment.)	Bail unknown in military service.
Nor cruel and unusual punishments inflicted. (Eighth amendment.)	Art. 41 of the existing code provides that "Punishment by flogging, or by branding, marking, or tattooing the body is prohibited." (Origin, act Aug. 5, 1861.)
Nor excessive fines imposed (Eighth amendment).	Whenever the punishment for a crime or offense made punishable by these articles is left to the discretion of the court-martial, the punishment shall not, in time of peace, exceed such limit or limits as the President may from time to time prescribe. (Present 45th article of war: Origin, act of Sept. 27, 1890.)

From the beginning, taking the articles of war of 1775, the next succeeding code of 1776, the amended articles of 1786, the adaptation of all those Revolutionary War articles to the Constitution by the Congress of the United States in 1806, the Articles of War as they existed from 1806 down to 1874 when the revised statutes were enacted, and on down to September 27, 1890, the punitive articles generally concluded with the language "shall be punished as a court-martial shall direct." It was not until 1863 that we had any provision of the statute law respecting cruel and unusual punishments, when Congress abolished flogging and branding in the Army. Flogging had been a punishment in the early days, but it had not survived in aggravated form when Congress abolished it; but branding of the deserter with the letter "D" on his hip had survived, and Congress abolished it in the early war period. But down to September 20, 1890, with the exception of capital punishment which could not be inflicted except where expressly authorized, there was nothing to regulate maximum punishments, and the result was, as I recall the situation when I was serving in the Department of Texas, one set of punishments in one military department and another set in another, with varying degrees of punishments for the same offense. Finally Congress was compelled to establish some kind of regulation, and enacted the act of September 27, 1890 (26 Stat. 491, supra), at the request of the War Department.

Immediately upon the passage of the act of September 27, 1890, the President got out maximum limits of punishment for all offenses that were punishable at the discretion of the court, and we consulted in the preparation of that list of maximum punishments the penal code of the United States, and, of course, the customary war punishments for military offenses, which were not covered in the penal code of the United States. There has been, since that date, a continuing regulation of maximum punishments for time of peace. When war breaks out this statute ceases to operate. I venture the assertion that if we had entered the war with that phrase "in time of peace" eliminated, you gentlemen would never have heard anything, nor would the country have heard anything, about excessive sentences. If I had my way about it I would regulate the whole thing by striking out the words "in time of peace," and leave this maximum punishment order to operate both in peace and war, at the discretion of the President,

who would lay before Congress periodically his orders on the subject. I think if you would take the maximum-punishment orders that have been issued since this legislation was enacted, you would be struck with the care that has been exerised and the humane provisions made in them on the general subject. Had it been in operation during the period of this war, I can readily conceive of the President prescribing that in home territory, 3,000 miles from the theater of war, the conditions of service sufficiently approximate a period of peace to recognize certain perscribed limits of punishment. He might have said, "We will leave that matter in the theater of war to the discretion of courts-martial." He might have said with greater propriety to the military force operating in Siberia under Gen. Graves that we would leave the discretion to courts-martial; or even in the Archangel theater. But, in any event, he could have moved as the situation justified, to establish these limits. There has always been a strong army opinion against regulating the discretion of courts-martial as to punishment in time of war, and the Kernan-O'Ryan-Ogden report, which is before you, takes very advanced ground on that subject. I dissent in that regard from the Kernan-O'Ryan-Ogden report. I want this other method tried as a practical means of regulating what has disturbed the country a great deal.

Now, of course, you will reach your conclusion after due consideration of the very forceful argument submitted by the Kernan-O'Ryan-Ogden Board. It might be well to hear some of the commanders of fighting units in France on the question whether it is practicable to regulate the discretion of courts-martial in matters of punishment in the zone of actual military operations. But my judgment, as at present advised, is to the effect that it would be wise to have the President clothed with this authority, to be exercised or not as he saw fit. Certainly the responsibility would be definite, for the establishment of safeguards against excessive punishments, if this statute were operative in time of war as well as in time of peace.

Senator LENROOT. Let me ask you this question: If the committee should determine to revive the maximum sentences, and have them apply to time of peace only, but give the President the power to make regulations applying to time of war, what would you say?

Gen. CROWDER. That would be the least objectionable way of placing the matter under congressional regulation; but I should like to ask this question: Why disturb the operation of a law that has worked so satisfactorily in time of peace heretofore? Take the actual administration of military justice since September 27, 1890, down to April 6, 1917, and see if there is any occasion for Congress to fix arbitrarily the limits of punishment by courts-martial. If this other scheme has worked, why abandon it? Of course, that will be one of the matters for the committee to determine: Have there been any abuses during this peace period? I have read the testimony before this committee carefully, and no one so far as I can find has argued the failure of the act of September 27, 1890, and executive orders issued thereunder, to operate effectively to safeguard the administration of military justice in this regard. I do not feel like making a change unless there is some necessity for it.

Senator LENROOT. Do you think it is desirable, General, to have the court-martial inflict what are really excessive punishments, so that as a rule they are reduced?

Gen. CROWDER. No; I do not.

Senator LENROOT. Is not that one of the questions?

Gen. CROWDER. Yes; for the war period; but, as a rule, they did not have to be reduced during time of peace.

Senator WARREN. The President makes those orders. Would they not come naturally, almost entirely and exclusively, from opinions rendered to him by the Judge Advocate General?

Gen. CROWDER. Clemency orders? Yes; almost entirely.

Senator WARREN. From his advice?

Gen. CROWDER. The clemency section of the Judge Advocate General's Office is always a very busy section, going over the records every time an application for clemency comes in, and measuring out to a man all the clemency that his offense will admit of or his good conduct merits.

Senator WARREN. Yes; I understand that; but my idea was, the President issuing regulations from time to time in the matter as to what should be the degree of punishment, whether he would not be obliged to get the suggestion and arguments and reasons from the Judge Advocate General? Would the matter not go back to the Judge Advocate General's office?

Gen. CROWDER. I understand. You are speaking, not of clemency orders, but of these maximum punishment orders. I can say this, that during my period of service as Judge Advocate General, now exceeding eight years, every revision of the maximum punishment order has been prepared in my office, and I have reason to believe that prior to my day, under Gen. Lieber and Gen. Davis, every maximum punishment order was prepared by the Judge Advocate General. We never had but one issue with the General Staff as to limits of punishments, and that was as to the limit for desertion. The General Staff thought that the limit of confinement should be equal to the period of the enlistment; if the enlistment was for five years the desertion should be punishable with a sentence of five years. It was at one time adopted and almost immediately abandoned. I led the fight to have it abandoned, because there is such a difference between desertion committed in the first 30 days of a man's enlistment and a desertion committed in the last 30 days of the man's enlistment.

Now, resuming my discussion of the protection accorded to military accused before courts-martial, I think it is obvious, from the foregoing comparison, that notwithstanding the fact that the rights and privileges accorded by the bill of rights to persons accused of crime have not been recognized by Congress as applicable to military offenders or offenses; nevertheless the Congress has by statute—the Articles of War and Rules of Procedure issued thereunder—with few exceptions secured those rights in large measure to such offenders, the noticeable exceptions being, trial by jury and the right to be confronted by witnesses in noncapital cases. With these two exceptions, practically every provision of the Bill of Rights, which individuals in general are entitled to invoke, is accorded by statute law in the measure deemed advisable by Congress, to offenders against military law. This may be shown more clearly by the following summary:

(*a*) Provision that there shall be no second jeopardy of life or limb is amply secured by the fortieth article of war which provides that "no person shall be tried the second time for the same offense."

(*b*) The provision for a speedy and public trial is amply secured by article 70 of the Articles of War; but no provision for such trial in the "State or district" in which the crime is committed is made, because it is impossible of application to military offenses, particularly in time of war or public danger. While the trial is not required by the statutes to be always public, it is the almost universal practice, which is departed from only in case of necessity, as where evidence could not be disclosed, being of a military nature arising in the theater of war, or where scandalous in nature and of a character where civil courts close also.

(*c*) The impartiality of the members of the court is secured by the right of challenge for cause. (A. W. 18.)

We have not the peremptory challenge, as you know, but they are seeking to introduce it. We will speak of that later.

(*d*) The requirement that no person be compelled in any criminal case to be a witness against himself is not only found in our statute law, but likewise in the Manual, and is in practice carefully observed. (M. C. M., pars. 214–215, pp. 103–104; pars. 234–236, pp. 115–118; A. W. 24; Ops. J. A. G., 1912, p. 502.)

(*e*) The accused is also protected from unreasonable search, procedure to produce private books, papers, or effects to be used against him in his trial. (M. C. M., pars. 214–215, pp. 103–104; pars. 234–236, pp. 115–118; A. W. 24; Ops. J. A. G., 1912, p. 502.)

(*f*) The accused is likewise to be, and is, informed of his rights to testify or to refrain from testifying in his own behalf, and any statement or confession made before the trial is carefully scrutinized to determine that it is not obtained under any compulsion or duress. (M. C. M., par. 215, pp. 103–104; pars. 225–226, pp. 110–113; par. 292, p. 140.)

(*g*) The right of the accused to have the assistance of counsel for his defense is accorded in the Articles of War, and the Manual expressly provides for this right in cases of general or special courts-martial and permits counsel of his own selection if such counsel be reasonably available (M. C. M., pars. 108–110, pp. 51–52; A. W. 17). While civilian counsel is not provided for at Government expense, the only limitation upon the right of the accused to have civilian counsel is that imposed by his own financial ability. By amendments to the Manual for Courts-Martial which were promulgated July 14, 1919, on my recommendation, every officer convening a court-martial is now also required, in the convening order, to detail a defense counsel for the court, to act for all accused persons who do not have their own counsel; and to be available, if desired by the accused, as associate counsel when the accused has counsel of his own. Provision is also made for excusing military counsel from other duties, to give them ample opportunity to prepare the defense of the case. (Changes No. 5, M. C. M., July 14, 1919, pars. 108–109.)

(*h*) The right to be confronted with the witnesses against him is accorded the accused in capital cases, and habitually in noncapital cases, although the Articles of War secure to both the Government and the accused the right to take depositions in noncapital cases. (A. W. 25; M. C. M., par. 165, p. 80.)

(*i*) The right to compulsory process for obtaining witnesses in favor of the accused is fully recognized and secured by the practice in such cases, although reasonable limitations are imposed because

of the nature of military service. (M. C. M., par. 161, p. 78.) In practice any witness requested by the defendant is usually summoned, and I know, after prolonged military service, of no instance where a witness requested by a military defendant has not been summoned where the denial would constitute prejudicial error.

It is easy to imagine a case where an accused in the Philippines asks for a witness from Alaska, that that witness be sent all the way to the Philippines to testify in a noncapital case, the answer would be, "Congress has provided for that case, and you will have to have these depositions."

Senator LENROOT. Right in that connection, I think you stated that you have a decision in the Supreme Court of the United States upon that question of being confronted with the witnesses.

Gen. CROWDER. What is that?

Senator LENROOT. Did you say that the Supreme Court had passed upon the question of the right to be confronted by witnesses?

Gen. CROWDER. No. Further on I will show you the scope of the judicial decisions. That is the next part of my statement.

Senator LENROOT. Very well.

Gen. CROWDER. (*j*) The right to be informed of the nature and cause of the accusation is fully secured and copies of the charges are required to be served on the accused in time to prepare his defense. (M. C. M., pars. 79–80, p. 42; par. 96, p. 48; A. W. 70.)

(*k*) The only prohibition against the infliction of cruel and unusual punishments and excessive fines in military cases is found in article of war 41, prohibiting flogging, or branding, marking or tattooing of the body, and article 45, which regulates maximum punishments in time of peace. It should, in my judgment, be made effective in war-time punishments by extending to the President the power to regulate maximum punishments at such a time, and thereby render impossible of occurrence some very excessive sentences which marked the administration of military justice during this war. If any good can come from the provision of the pending bill (art. 44) in enacting the general language of the Constitution prohibiting cruel and unusual punishments by courts-martial, let it be done; but while excessive punishments have been alleged and proved, not one that was cruel and unusual in kind or degree has been alleged.

(*l*) The security against conviction of treason, except upon confession in open court or the testimony of two witnesses to the same overt act, is expressly secured to persons in the Army accused of that crime. (M. C. M., sec. 248, p. 122.)

(*m*) There is no suspension of the privilege of habeas corpus, as applied to persons in the Army, except upon the same terms as applied to persons generally, and military persons are as free to use that writ as are civilians.

Now, my second proposition is this:

B. It is likewise true that the courts of the United States have announced the view of nonapplicability of the Bill of Rights, so vigorously condemned by Gen. Ansell.

Among the judicial pronouncements on this question is Ex parte Milligan (71 U. S. (4 Wall.), 2, 123), decided in 1866. Mr. Justice Davis, delivering the opinion of the court, said:

The sixth amendment affirms that "in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury," language broad

enough to embrace all persons and cases; but the fifth, recognizing the necessity of an indictment, or presentment, before anyone can be held to answer for his crimes, "excepts cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger"; and the framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.

In the concurring opinion of Mr. Chief Justice Waite, we find the following language:

The Constitution itself provides for military government as well as for civil government. And we do not understand it to be claimed that the civil safeguards of the Constitution have application in cases within the proper sphere of the former.

It is not denied that the power to make rules for the government of the Army and Navy is a power to provide for trial and punishment by military courts without a jury. It has been so understood and exercised from the adoption of the Constitution to the present time.

Nor, in our judgment, does the fifth, or any other amendment, abridge that power.

Senator LENROOT. That, however, is not a majority opinion.

Gen. CROWDER. No, but it is a concurring opinion. (Continuing reading:)

"Cases arising in the land and naval forces, or in the militia in actual service in time of war or public danger," are expressly excepted from the fifth amendment, "that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," and it is admitted that the exception applies to the other amendments as well as to the fifth.

Those are the three judges that joined with Chief Justice Waite. [Continuing reading:]

We think, therefore, that the power of Congress, in the government of the land and naval forces and of the militia, is not at all affected by the fifth or any other amendment.

Now, that was not the opinion of Chief Justice Waite only, who was the Chief Justice at that time, but also of the three judges that concurred with him.

In re Bogart (Fed. Cases, No. 1596), decided in 1873, is another case directly in point. In that case Judges Sawyer, circuit judge, and Hoffman, district judge, sitting at circuit, squarely held (quoting from syllabi):

4. The power of Congress to provide for the government of the land and naval forces is not affected or limited by the fifth, or any other amendment.

In addition to the foregoing, there is the following supporting dictum from Ex parte Milligan, supra,

The discipline necessary to the efficiency of the Army and Navy requires other and swifter modes of trial than are furnished by the common-law courts; and in pursuance to the power conferred by the Constitution, Congress has declared the kinds of trial and the manner in which they shall be conducted, for offenses committed while the party is in the military or naval service.

My third proposition is this:

C. It is likewise true that military text writers have adopted the view of the nonapplicability of the Bill of Rights condemned by Gen. Ansell.

Winthrop—and Gen. Ansell very properly refers to him as the Blackstone of military law, a man of superb reasoning power—Winthrop, in his Military Law and Precedents, vol. 1, page. 241, discussing the right of an accused to counsel, and announcing that orders of

the War Department require that commanders of posts shall detail without request of an accused a suitable officer as his counsel, says:

But in general it is to be said that the admission of counsel for the accused in military cases is not a right but a privilege only—

Citing in support of this view the following text writers: McArthur, writing between 1792 and 1813; McComb in 1809; Tyler in 1814; Benét in 1863–1868; Hough in 1825–1855; Hughes in 1845; and Kennedy in 1847. As against this he cites a single American author—De Hart in 1846–1862. Winthrop continues his comment, that notwithstanding it is held to be a privilege only, it is—

Yet a privilege almost invariably acceded to, and as a matter of course; and that, whether the counsel proposed to be introduced be a military or civil, professional or unprofessional person.

In a foot note, Winthrop further discusses the matter in language as follows:

Article VI of the amendments to the Constitution provides that "in all criminal prosecutions" the accused shall "have the assistance of counsel for his defense." The reference here is to prosecutions before the criminal courts of the United States only. (Barron *v.* Mayor of Baltimore, 7 Peters, 243; Ex parte Watkins, Id. 573; Twitchell *v.* Com., 7 Wallace, 326; Edwards *v.* Elliott, 21 Id., 557; Walker *v.* Sauvinet, 92 U. S., 90; Pearson *v.* Yewdall, 95 U. S., 294; I Bishop, C. L. No. 725; Wharton, C. P. & P. No. 290.) Military courts, however, though not bound by the letter, are within the spirit of the provision.

Now, that is a summary of the views of text writers.

Next I come to a rather important part of this subject. Upon this question of the applicability of the Bill of Rights to military accused and military offenses, I have reviewed under heading "A" the legislative precedents showing that Congress has legislated upon the theory of the nonapplicability of the Bill of Rights; under "B" the judicial precedents down to 1873, showing that the courts of the United States adopted that view of nonapplicability; and "C" the textbook doctrine to the same effect. But Gen. Ansell says that all of this doctrine of nonapplicability was swept away in a leading case in military law (Grafton *v.* U. S., 206 U. S., 333, 348) decided in 1907. He says:

There was involved in that case an issue in which I was then and still am deeply interested, and that is, the very character of these courts-martial, and how far these principles of the Bill of Rights and the other principles of the law—common law, Anglo-American law—are applicable to these courts-martial in order to secure a fair trial. I say this was the issue involved. (Record of Hearings, p. 125.)

Then he proceeds with this statement:

The court took occasion to say this: "We base our decision not upon the fact that this clause of the Constitution of the United States has been carried to the Philippines by congressional enactment; we do not base this decision on the fact that Congress has enacted, in the old fortieth article of war, an inhibition against double jeopardy. We base it upon the fact that the Constitution of the United States applies, regardless of legislation." (Record of Hearings, p. 126.)

Gen. Ansell adds the further comment:

And yet, apparently, the Judge Advocate General's Department of the Army up until recently have never seen the great point of that case. (Record of Hearings, p. 126.)

Gen. Ansell says further:

The Grafton case holds that the protection against double jeopardy a man gets when tried by court-martial comes not from statute, but from the Bill of Rights of our Constitution (p. 264).

I am frank to say to this committee that if the language which Gen. Ansell here attributes to the Supreme Court in this case were, in fact, uttered by the court, it would determine the question in accordance with his contention. I have been unable to find that language, and three officers of my department who have been given the task to scan the decision fail to find this language in the decision of the Supreme Court.

I want you gentlemen now to look at Ansell's testimony, where it is put down. I would like to ask, first, whether or not he is attributing that language to the Supreme Court, and then whether it can be found.

Senator LENROOT. What is the volume of the Supreme Court decisions; have you the citation there?

Gen. CROWDER. I have the citation right here. It is the case of Grafton *v.* United States (206 U. S., pp. 333-348).

Now, it is a serious thing to charge, and I do not charge, Gen. Ansell with having attributed language to the Supreme Court which it did not utter, but I ask you whether or not this ought not to be verified before it goes out to the public as having been stated before the Military Committee?

Senator LENROOT. Did you note this language, Senator [indicating record]?

Senator WARREN. Yes.

Gen. CROWDER. I can not find it. I mentioned the matter to a Senator who happened to be in my office, and he said, "You must be mistaken. No man would attribute language to the Supreme Court that can not be found." Then I asked another lawyer to come over here to the Capitol and examine the original opinion and briefs in the case, to see if that language was used by the court or in any of the contending briefs, and he reported back that that language was not to be found.

Let me say further: In the Grafton case, counsel for the accused contended that his acquittal by the court-martial forbade his being again tried in the civil court for the same offense, basing that contention in part upon that clause of the fifth amendment of the Constitution providing: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb," and in part upon the act of Congress of July 1, 1902, providing temporarily for the administration of the affairs of civil government in the Philippine Islands, and which act likewise embraced a double jeopardy provision in language reading somewhat differently from the double jeopardy clause in the fifth amendment, to wit: "No person, for the same offense, shall be twice put in jeopardy of punishment" (32 Stat., 691); and the court in concluding its opinion said:

> But passing by all other questions discussed by counsel or which might arise on the record and restricting our decision to the above question of double jeopardy, we adjudge that, consistently with the above act of 1902 and for the reasons stated, the plaintiff in error, a soldier in the Army, having been acquitted of the crime of homicide alleged to have been committed by him in the Philippines, by a military court of competent jurisdiction, proceeding under the authority of the United States, could not be subsequently tried for the same offense in a civil court exercising authority in that Territory.

In other words the court refer to one of the contentions, namely the contention that the act of 1902 applied, and say, "consistently

with that act" we hold, etc. Now, there is some other language in the decision of the Supreme Court which I want to quote, in all fairness to Gen. Ansell. The only language of the decision in the Grafton Case which in any manner tends to support Gen. Ansell's construction is the following:

> The express prohibition of double jeopardy for the same offense means that wherever such prohibition is applicable, either by operation of the Constitution or by action of Congress, no person shall be twice put in jeopardy of life or limb for the same offense. Consequently a civil court proceeding under the authority of the United States can not withhold from an officer or soldier of the Army the full benefit of that guaranty, after he has been once tried in a military court of competent jurisdiction. Congress, by express constitutional provision, has the power to prescribe rules for the government and regulation of the Army, but those rules must be interpreted in connection with the prohibition against a man's being put twice in jeopardy for the same offense. The former provision must not be so interpreted as to nullify the latter.

But construing this with the closing language of the opinion cited supra, only that was decided in the Grafton case which had to be decided to dispose of the case. It follows that so much of the discussion of the court as is broader than the clear issue under the statutory jeopardy clause enacted for the Philippines is in the nature of "obiter dictum" and without binding effect.

An analysis of Grafton *v.* United States shows that that case by no means disposes of the doctrine of the applicability to courts-martial of the jeopardy clause of the fifth amendment to the Constitution.

Senator LENROOT. Your position, then, is that the Supreme Court has never authoritatively passed upon the position at all?

Gen. CROWDER. First, my position is that I can not find this language attributed to the Supreme Court. If it was there, I would concede the point.

My second point is that the Grafton case does not dispose of the question.

Senator LENROOT. Generally, your position is that the Supreme Court has in no case decided this question?

Gen. CROWDER. I do not find that it has.

Senator LENROOT. You read the Milligan case and the other case, and there they did not pass upon it?

Gen. CROWDER. There the statement is that neither the fifth nor any other amendment is applicable.

Senator LENROOT. No; not in the majority opinion.

Gen. CROWDER. Not in the majority opinion; but in In re Bogart, which followed it seven years later, that point was decided.

Senator LENROOT. That is obiter.

Gen. CROWDER. No; I quote right from the syllabus of the case. In In re Bogart the ruling was direct to the point that neither the fifth nor any other amendment is applicable.

Senator LENROOT. No; but that is not the Supreme Court.

Gen. CROWDER. Not the Supreme Court.

Senator LENROOT. I said the Supreme Court has never passed upon it.

Gen. CROWDER. It has not passed upon the exact question, so far as I can find.

Senator LENROOT. I just asked as to the question, whether it was an open question with the Supreme Court of the United States?

Gen. CROWDER. It seems to be. If there are any questions I will be glad to answer. That finishes all that I have to say on the Bill of Rights.

I want to deal next with courts-martial as "executive agencies" and try to answer this question of whether we have any courts that are obeying orders of military commanders.

Senator WARREN. If you prefer to suspend now, General, if you want to leave town——

Gen. CROWDER. No; I prefer to go ahead. I will remain.

Senator WARREN. Then we shall take this up again to-morrow morning, and if I can get Senator Chamberlain here, I will do so. I think I am justified in saying that you would prefer to give your testimony when he is present?

Gen. CROWDER. Yes; I would much prefer that he should be here. I would like to have his interrogation on these points, because I shall shortly reach a stage where there are many disputed questions of fact.

(Thereupon, at 1 o'clock p. m., the subcommittee adjourned until to-morrow, Saturday, October 25, 1919, at 10 o'clock a. m.)